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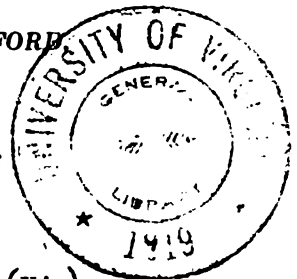
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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

At the Term commencing in February, 1814.

IN THE THIRTY-EIGHTH YEAR OF THE COMMONWEALTH/

Jones against Stevenson.

Argued, February 8th, 9th, & 10th, 1814.

IN an action of Assumpsit in the Superior Court of Spottsylvania county, *James Stevenson* complained of *William Jones*, in custody, &c. of a plea, &c. "for that, whereas on the day of , in the year 1803, at Fredericksburg, in Spottsylvania aforesaid, and within the jurisdiction, 1. In Assumpsit, upon an agreement for delivery to the plaintiff of a quantity of merchantable flour barrels, at his the defendant's shop at W., at

certain times, until the whole number should be delivered; with a stipulation, that if the plaintiff should not then and there be ready to receive them, the same should be counted out in the presence of J. A., who then resided at W., and he thereafter the property, and at the risk of the plaintiff; it is a good and sufficient plea in bar to the action, that the defendant was ready, at his shop at W., at the times appointed, to deliver the requisite number of barrels to the plaintiff, who was not then and there ready to receive them; that, thereupon, the defendant, from time to time, counted out the barrels, according to the agreement, in the presence of J. A., until he moved away from W.: and that, after the said J. A. had moved from W., he the defendant, at his said shop at W., at the times for delivery stipulated, had the number of barrels, required by the agreement, ready to be delivered to the plaintiff, and counted out for him, and then and there required the plaintiff to receive the same, which he entirely neglected to do.

2. A replication to such plea, stating that the defendant did not count out in the presence of J. A. the barrels set forth in his plea, nor count out, thereafter, for the plaintiff, at the stipulated times, the barrels agreed to be delivered; without averring that the defendant did not then and there require the plaintiff to receive the same;—is bad upon demurrer, as being an answer to a part only of the plea.

3. *Quere*, whether it is competent to the plaintiff, in any action other than *replevin*, to tender an issue in fact by a replication, and an issue in law by a demurrer, to the same plea?—See *Rev. Code*, 1st Vol. ch. 66. sect. 40. p. 80; and *Syme v. Griffin*, 4 H. & M. 277.

4. Whenever there is an issue in fact, and also a demurrer, the demurrer ought regularly first to be decided; but an irregularity in this respect is not sufficient to reverse a judgment to which there is no other objection. See *Tidd's Pr.* p. 684—5.

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" &c. the said *James* bargained with the said *William* for one
" pipe of Madeira Wine, at the price of three hundred and
" fifty dollars, equal to 105*l.* which said price the said *William*
" then and there promised and agreed to pay the said *James*
" in merchantable flour barrels at two shillings and sixpence
" each, to be delivered at his the said *William's* shop at the Wil-
" derness Tavern, in the following manner, to wit, one hundred
" barrels at the end of five working days from the date of mak-
" ing the said bargain, and one hundred barrels at the end of
" every five working days thereafter, until the whole quantity
" was delivered; and if the said *James* was not, at the stipu-
" lated time for each delivery, present to receive them, then
" the said barrels were to be counted out in the presence of
" *John Almond*, who then resided at Wilderness, after which,
" the barrels so counted out were to be the property, and at
" the risk, of the said *James*: and the said *James* in fact
" says he has fully complied with that part of the said bargain
" on his part to be performed, and delivered to the said *William*
" the said pipe of Madeira wine; yet the said *William* did
" not deliver to the said *James*, or count out, in the presence
" of the said *John Almond*, at his shop at the Wilderness Ta-
" vern, or at any other place, one hundred merchantable flour
" barrels, at the end of five working days from the said bar-
" gain, and one hundred merchantable flour barrels, at the end
" of every five working days thereafter, until the whole quan-
" tity was delivered; whereby the said *James* lost a large sum
" of money, &c.

The declaration farther charged other agreements to the same effect, and breaches of, on the part of the defendant, in various ways, in six other special counts, and concluded with a general count for goods, &c. sold and delivered.

The defendant pleaded *non assumpsit*; to which plea the plaintiff joined issue. " And the said defendant, by leave of
" the Court, &c. for farther plea, said, that the plaintiff his ac-
" tion aforesaid in form aforesaid thereof against him ought not
" to have or maintain, because he saith that, on the day
" of , in the year , at the county aforesaid,
" it was then and there agreed that the said plaintiff should sell
" and deliver to the said defendant a pipe of Madeira wine, at the
" price of three hundred and fifty dollars, to be paid for by the

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“ said defendant in merchantable flour barrels, at two shillings
“ and sixpence each, to be delivered at his, the said defend-
“ ant’s shop, at the Wilderness Tavern, in the following man-
“ ner, one hundred barrels at the end of five working days from
“ that day, and one hundred barrels at the end of every five
“ working days thereafter, until the whole quantity was deli-
“ vered; and if the said plaintiff was not then and there ready,
“ at the said stipulated periods for the delivery of each hun-
“ dred barrels until the whole quantity was delivered, to re-
“ ceive the same, that the said one hundred barrels, at the end
“ of each of the said five working days, should, then and
“ there, on the said respective days, be counted out in the pre-
“ sence of *John Almond*, who then resided at the Wilderness
“ Tavern;—after which, the barrels so counted out were to
“ be the property, and at the risk, of the said plaintiff, and
“ the said defendant then and there discharged for so many of
“ the said flour barrels: and the said defendant in fact saith,
“ that he, on the day of , in the year
“ at his shop at the Wilderness Tavern, in the county afore-
“ said, which was the end of five working days after the said
“ agreement, was then and there ready to deliver the said one
“ hundred merchantable flour barrels to the said plaintiff, who
“ was not then and there ready to receive them; and that the
“ said defendant was, at the end of each five working days
“ thereafter, until the whole quantity should be delivered, rea-
“ dy to deliver one hundred merchantable flour barrels to the
“ said plaintiff, who was not then and there ready to receive
“ the same; and that the said defendant did, then and there,
“ which was at the end of five working days after the said
“ agreement, in pursuance of and in compliance with his said
“ agreement and undertaking, (the said plaintiff not being
“ then and there present to receive the same,) count out, for the
“ said plaintiff, in the presence of the said *John Almond*, one
“ hundred merchantable flour barrels, and which were, then
“ and there, after the said counting out, the property and at
“ the risk of the said plaintiff:—and the said defendant doth
“ in fact aver that he did, at his said shop at the Wilderness
“ Tavern, in the county aforesaid, at the end of every five
“ working days thereafter, count out, in the presence of the
“ said *John Almond*, one hundred merchantable flour barrels,

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“ for the said plaintiff, in performance and fulfilment of his the
 “ said defendant’s promise and undertaking aforesaid, and
 “ which were then and thereafter the property and at the
 “ risk of the said plaintiff, and a discharge to the said de-
 “ fendant from his said promise and undertaking *for so much*,
 “ until the fifteenth day of December in the same year, when
 “ the said *John Almond* moved away from the said Wilder-
 “ ness Tavern; at which time the quantity of two hundred
 “ and forty merchantable flour barrels had been counted out
 “ for the said plaintiff, as his property and at his risk,
 “ and which, by the said promise and agreement between the
 “ said plaintiff and the said defendant, was then and there a
 “ discharge to the said defendant *for so much* of the said pro-
 “ mise and agreement on his part to be kept and performed :—
 “ and the said defendant saith that, after the said *John Almond*
 “ had removed from the said Wilderness Tavern, and was
 “ not then and there at the shop of the said defendant, he the
 “ said defendant did, then and there, at the end of every five
 “ working days after the said last day of counting out as afore-
 “ said, have then and there one hundred merchantable flour
 “ barrels *ready to be delivered to the said plaintiff in compliance*
 “ *and in full performance of the said promise and agreement*
 “ *aforesaid*, until the whole quantity was delivered agreeably
 “ to the said promise, agreement, and undertaking aforesaid,
 “ *and then and there required the said plaintiff to receive the*
 “ *same, which he entirely neglected to do* :—and the said de-
 “ fendant farther saith, that he did, then and there, at the end
 “ of every five working days, after the said removal of the said
 “ *Almond*, and at the end of the five working days after he
 “ counted out the last hundred merchantable flour barrels in
 “ the presence of the said *Almond*, and at the end of every
 “ five days thereafter, *count out for the said plaintiff one hun-*
 “ *dred merchantable flour barrels, until the whole quantity was*
 “ *counted out*, in full discharge of the said three hundred and
 “ fifty dollars, at the said price of two shillings and sixpence
 “ for each barrel, *agreeably to and in pursuance of his said part*
 “ *of the said promise and agreement aforesaid, and in full dis-*
 “ *charge and satisfaction thereof*; without that, that he the
 “ said defendant, made any other or farther promise and as-
 “ sumption in manner and form as the said plaintiff thereof

“ against him hath complained ; and this he is ready to verify, wherefore he prays judgment,” &c.

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The defendant also filed another special plea, to the same effect in substance.—The plaintiff filed a special replication to each of these special pleas ;—stating, in the first replication, “ that the said defendant did not, in full discharge and satisfaction of the promise set forth in his plea, (which is the same as the said first, and second, and sixth, set forth in the said declaration,) count out, in the presence of the said *John Almond* mentioned in the said plea, two hundred and forty merchantable flour barrels, at the rate of one hundred for every five working days from the time of making the said promise and undertaking, nor did the said defendant thereafter count out, at the end of every five working days, one hundred merchantable flour barrels for the said plaintiff, until the whole quantity was counted out, in manner and form as the said defendant in pleading secondly has alleged ; and this the said plaintiff prays may be inquired of by the country.

The plaintiff, in his second special replication, said, “ that the defendant did not, in performance of the said promise set forth in the said third plea, (which is the same promise and agreement as those set forth in the said first and second and sixth counts of the said declaration,) count out, in the presence of the said *John Almond*, for the said plaintiff one hundred merchantable flour barrels, within or at the end of five working days from the making the said promises and undertakings, and one hundred such barrels within or at the end of five working days from the said first counting out ; nor was the said defendant, at the end of every five working days thereafter, at the said Wilderness Tavern, ready to deliver to the said plaintiff one hundred merchantable flour barrels, which were put by and counted out for the said plaintiff until the whole quantity was counted out in manner and form as the said defendant in the said third plea hath alleged, and this, &c.

The plaintiff also demurred to the same pleas of the defendant ;—“ for that the said second and third pleas severally amount to the general issue as to the promises severally set forth in the fifth, seventh and eighth counts of the declaration ;—for that the said pleas are respectively and several-

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1814. "tain, insufficient, and informal."

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The defendant joined in demurrer; and, on his part, demurred to each of the plaintiff's special replications; "1st, because the said plaintiff hath filed a replication to the said defendant's plea, and thereby tendered an issue in *fact*, and hath also *demurred* to the *same* plea, and tendered an issue *in law*; 2d, because the said replication, although it professes to be an answer to the whole of the said plea, yet is only an answer to a part, and leaves the residue unanswered;"—in which demurrers the plaintiff joined.

A Jury was empaneled to try the issue on the plea of non assumpsit, and found a verdict for the plaintiff for \$312 33 cents damages:—and "the several demurrers of the defendant to the replications of the plaintiff being argued and overruled," the Court rendered a judgment according to the Verdict; from which the defendant appealed.

Williams for the appellant.

Stanard for the appellee.

December 7th, 1815, Judge CABELL pronounced the following opinion of the Court.

Few cases have occurred in which the pleadings have been more unnecessarily multiplied, protracted and entangled.—In the obscurity and perplexity thus thrown over the case, the difficulty is more in *ascertaining* than in *deciding* the points in controversy.

The special pleas of the defendant in the Court below presented, each of them, a complete bar to the action of the plaintiff, provided the facts therein relied upon were true.—To these pleas the plaintiff both replied and demurred. To the replications there were demurrers and joinders therein; and there were also joinders in the demurrers of the plaintiff to the pleas of the defendant.—Not *deciding* whether it was competent to the plaintiff to reply and to demur to the *same* pleas, but admitting his right to do so, the Court is of opinion that the law, both upon the defendant's demurrers to the plaintiff's replications, and upon the plaintiff's demurrers to the defendant's pleas, was in favour of the defendant; in the

first case, because the replications were answers to a part only of each of the defendant's pleas, and therefore did not remove the bar which the pleas, taken altogether, presented to the action; and, in the second case, because the facts in the pleas were admitted by the demurrers, which facts, as before stated, presented a complete bar.

This case shews the propriety of the decision of this Court in the case of *Green v. Dulany*, (2 Munf. 518,) that, where there is an issue of fact, and also a demurrer, the demurrer ought first to be decided. By pursuing this course, if the Court below had correctly decided the demurrer, the parties would have been saved the expense, and the Court would have been saved the time of trying the issue by a Jury. We do not understand the opinion of the Court, however, in that case, as deciding that this irregularity would, of itself, be sufficient to reverse a judgment to which there should be no other objection.—In the case now before the Court, there are other and stronger objections; an improper judgment upon the demurrers of the defendant, and an omission to pronounce any judgment on the demurrers of the plaintiff. The Court is therefore of opinion, that the judgment be reversed, and that judgment be entered for the appellant.

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Bream against Cooper's Heirs.

Argued February
14th, 1815.

THE appellant *Bream* brought ejectment in the Superior Court of Mason county, against the appellees, for a tract of land lying in that county, and the parties being at issue went to trial.

At the trial the plaintiff filed three bills of exceptions; the first of them stating, in substance, that the plaintiff offered to prove by circumstantial testimony, which is set forth at large, "lessor of the plaintiff for a specified time; it must be understood that such possession was adverse to those under whom the lessor of the plaintiff claimed; especially, if it appear from another bill of exceptions in the same trial, that the title of the lessor of the plaintiff did not commence until after the death of the said testator.

2. If it appear from the record in ejectment, that the defendant, or his testator, had adverse possession of the land, at the time when a deed of trust, under which the plaintiff claims, was executed, judgment ought to be rendered for the defendant, although the nature of his title does not appear.

1. If it be stated in a Bill of exceptions, upon a trial in ejectment, that the testator of the defendant departed this life in possession of the land, which possession he had held "adverse to the

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that the testator of the defendants had notice of the title of the lessor of the plaintiff;—whereupon the Court instructed the Jury that such evidence was not sufficient to prove notice as aforesaid, and refused to permit the same to go in evidence to them, to which opinion the plaintiff excepted, &c.

The second stated, that the testator of the defendants departed this life sometime in the fall of 1807, in possession of the land in the declaration mentioned, and the possession of which he had held *adverse to the lessor of the plaintiff* from the year 1797.—The plaintiff offered to prove, by other oral evidence, that the present defendants, since the death of their testator, had notice of the title of the lessor of the plaintiff; but the Court also refused to admit such oral evidence to go to the Jury, and instructed them, “that *the lessor of the plaintiff* “*having an adverse possession* at the time of the deed of trust “being executed, (1) and that possession being continued, the “Jury ought to find for the defendants.”—To this opinion the plaintiff also excepted, &c.

The third bill of exceptions stated, that the plaintiff to support his title offered as evidence a grant from the Commonwealth to *Andrew Lewis*, bearing date on the 24th of July 1787; a deed of trust from *Lewis* to a certain *Francis Follette*, bearing date on the 13th August, 1806, conveying the land to him as trustee for the payment of a debt due to the lessor of the plaintiff, with a proviso for sale, &c. on default of payment, &c.—To the admission of this deed as evidence, the defendants objected, because it did not appear to have been proved by three witnesses, and recorded within the time prescribed by law; two of the witnesses only having proved it within eight months, and the other witness having proved it after the eight months had expired; which objection was sustained by the Court.—The plaintiff also offered in evidence a deed from *Follette* to the lessor of the plaintiff, bearing date on the 29th of January 1810, reciting a sale, &c. in conformity with the terms of the deed of trust, a purchase by the lessor of the plaintiff, &c. To the admission of which deed also the defendants objected, “unless the plaintiff did *show*

(1) Note. So in the Record;—but it seems the meaning is that, “*there being* “*a possession, adverse to the claim of the lessor of the plaintiff*, at the time of the “deed of trust being executed,” &c.

" that *Francis Follette* the trustee had duly and legally *adver-*
tised and sold the land agreeably to the stipulations of the
 " said deed of trust," which objection was also sustained by
 the Court. Whereupon the plaintiff again excepted, &c.

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A Verdict was found for the defendants, and judgment
 rendered accordingly.

Wickham for the appellant, relied on the following points :

1st. That the court erred on the point stated in the first
 bill of exceptions ; first, in instructing the jury on the *suf-*
ficiency of the evidence, and then in prohibiting that evidence
 from going to the jury on the ground of its insufficiency.

2d. That, on the point stated in the second bill of exceptions,
 the court erred in instructing the jury that they ought to find
 for the defendants, as it does not appear from the bill of excep-
 tions that the possession of the defendants was adverse to *those*
under whom the plaintiff claimed, but only to the *plaintiff him-*
self ; and the nature of that possession, or the title set up by
 the defendant, does not appear.

3d. That the court also erred on the two points stated in the
 third bill of exceptions ; first, because the deed offered in evi-
 dence, whether recorded in due time or not, was good, except
 as to creditors and subsequent purchasers, and it does not ap-
 pear that the defendants were either the one or the other ; and,
 secondly, because, whether the sale to the lessor of the plain-
 tiff was in conformity with the trust deed or not, the legal title
 passed to him by the conveyance from the trustee, and if there
 was any irregularity in the sale, *Lewis*, the person who convey-
 ed in trust, could alone object to it, and that only in a Court of
 Equity.

Wirt, contra, insisted that, upon the whole record, the case
 was clearly against the plaintiff ; for no title passed by the deed
 of trust, or by the conveyance from the trustee, because a per-
 son out of possession cannot convey, according to the cases of
Tabb v. Baird, (a) *Hall v. Hall*, (b) and *Clay v. White* ; (c) that therefore judgment should be given against him, whether
 certain parts of the evidence were admissible or not. (d)

(a) 3 Call 475.
 (b) *Ibid* 438.
 (c) 1 *Munf* 162.
 (d) *Wood v.*
Luttrell, 1 *Call*
 232 ; *Davies v.*
Miller, 1 *Call*
 127 ; and *Fras-*
ton v. Harvey,
 2 *H. & M.* 55.

December 9th, 1815, Judge ROANE pronounced the court's
 opinion :

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Bream
v.
Cooper's heirs.

The court is of opinion, that, it being stated, in the second bill of exceptions, that the testator of the appellees died in possession of the land in controversy, in the fall of 1807, and had held possession thereof, "adverse to the lessor of the plaintiff" (the appellant) "from the year 1797;" that the possession is not to be taken to relate to the said appellant only, in exclusion of *Lewis* and *Follette*, under whom he claims; especially as the said appellant's title did not commence until after the death of the said testator, viz. on the 29th of January, 1810. The said possession, therefore, being considered as adverse to *Lewis* and *Follette*, under whom the appellant claims, the court is of opinion that there is no error in the instruction in the said bill contained, which states, that the testator of the appellees having had an adverse possession at the time of the deed of trust being executed, and that possession being continued, the jury ought to find for the defendants.

On this ground, without considering any other, the court is of opinion to affirm the judgment.

Argued January
17th, 1816.

Ligon against Ford.

1. A submission to arbitration, held a waiver of objections to previous proceedings in the cause.

2. An action of crim. con. being referred to arbitration by rule of court, if the arbitrators refuse to hear testimony offered by the defendant, impeaching the credit of the plaintiff's witnesses, or touching the deportment of the plaintiff's wife before her alleged seduction; this is such misconduct as vitiates their award; and the court ought not to decline hearing proof of such misconduct.

FORD brought an action, in the District Court of *Petersburg*, against *Ligon*, for criminal conversation with *Ford's* wife. Plea, "not guilty." On the division of the court, the cause was sent to the Superior Court of *Amelia*; where it was tried, and a verdict rendered for the plaintiff for one hundred dollars damages; which verdict the court set aside, and granted a new trial on the ground that the case was an aggravated one, without a single circumstance of palliation, and the damages extremely inadequate. The venue was afterwards changed, and the cause transferred to the Superior Court of *Nottoway*; and there, by rule of court, referred to three arbitrators, or any two of them, whose award was to be the judgment of the court. Two of the arbitrators met, and, in the presence of the parties, made an award in the plaintiff's favour for one thousand dollars. It does not appear, that the other

It does not appear, that the other

arbitrator had notice of the time and place of arbitration, or that any objection was made on that ground, at the time of arbitration, or in the court below. The defendant filed several exceptions to the award, of which the two material were the 3d, That at the time of the making of the award, the defendant offered evidence to the arbitrators, to prove, that the testimony of the two principal witnesses ought not to be credited, from their general character, and the variance of their testimony from that they had before given in the same cause; and the arbitrators refused to hear such discrediting testimony; and the 4th, That they prohibited the defendant from examining any evidence, as to the character and general deportment of the plaintiff's wife, before her alleged seduction by the defendant. And the defendant offered to prove to the court, that the facts stated in the exceptions, were true. But the court refused to hear such proof; overruled the exceptions, and gave judgment for the plaintiff, according to the award: from which the defendant appealed to this court.

JANUARY,
1816.

Ligon
v.
Ford.

Leigh for the appellant. The court of *Amelia* ought not to have granted a new trial, on the mere ground of inadequate damages, however extreme the case. It has long been settled, that, in cases of personal tort, a new trial cannot be granted on the ground of smallness of damages; (a) and there is not a single precedent in the books to the contrary. In the common cases of personal tort. (assault and battery, and the like,) it has been often asked, if any good reason can be assigned, why the courts may, as they do daily, grant new trials for excess of damages, and not, *et converso*, for the smallness of damages? The one case requires the interposition of the courts less strongly and frequently than the other. Where the damages are too small, the parties are left nearly in their former condition; where excessive, there is a sudden, and, in one sense, a violent change of property. Then, it much more rarely happens, that he, that sustains a real outrage, fails to excite the sympathy of juries, than that he that has perpetrated one, fails to rouse their indignation; courts of justice are hourly employed in restraining the *vehemence* of men's feelings; in correcting their *moderation*, never. And, of all kinds of actions, those of personal tort, are most often frivolous, vexatious, and spiteful. As to this

(a) *Barker v. Dixie, Str. 1051.*

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(c) 1 Burr. 689.
and 4 T. R. 563.

action for criminal conversation, it has been solemnly ruled, that a new trial cannot be granted, even for enormously excessive damages; as where the jury found 500*l.* when the court would have been satisfied with nominal damages. *Welford v. Bukeley*, and *Duberly v. Gunning*. (a) In the last cited case, Lord *Kenyon* plainly regards a new trial, for inadequate damages, as utterly out of the question. And the utmost point to which any court has ever gone, in *crim. con.* cases, was to say, that it would grant a new trial for excessive damages, if it should appear, that the jury acted under the influence of undue motives, or some gross error or misconception of the subject. (b) The import of that decision (as I understand it) is, that a new trial may be granted, not for excessive damages simply, but for excessive damages proceeding from misconduct of the jury. Possibly, it may be held, that the subsequent arbitration superseded this question; as all matters in difference in the cause were referred, and this was one matter of difference. But, it is plain it never entered into the arbitrators' heads, to determine this question on the law of new trials. And if it shall be intended, that they did decide the question, and they decided it erroneously; then the award is chargeable with error in law, and is therefore bad; which brings us back to the point, was the new trial properly awarded or not?

(b) *Chambers v. Coulfield*, 6 East. 236.

(c) *Doyley v. Burton*, 1 *Ld. Raym.* 533.

However, if this court have decided, that an arbitration operates like a release of all previous errors in the proceedings, I must yield this first point, and rely on the objections that lie against the award itself. And first, the award is bad for want of mutuality, no release being awarded for the defendant. (c) But I mention this point with diffidence; as it seems to have been disregarded both by bar and bench, in some cases in this court, where it might have been as well raised, as here; and it may, indeed, be unwise to encourage objections to awards, which look rather technical. The award is substantially bad, because it does not appear, that the third arbitrator, who did not join therein, had notice of the meeting of the other arbitrators, though the award by two had been sufficient, if the third had had notice. *Dalling vs. Matchett* is directly in point. (d) But my chief objection is, that the arbitrators were guilty of what amounts to misbehaviour. If so, the court ought to have heard the proof offered, of the truth of the facts im-

(d) *Willis*, 215.

puted; (a) and should, perhaps, infer misconduct from very gross mistakes. (b) If the arbitrators departed from the plainest principles of law and natural justice, this was misbehaviour, perhaps partiality. And I affirm they did so. Happily, actions for criminal conversation are extremely rare in this country; and the arbitrators, possibly, might not have known, that the general deportment of the plaintiff's wife, before her alleged seduction by the defendant, was a proper subject of inquiry. But they could not have been ignorant, that it was their duty to bear proof touching the credit of the plaintiff's witnesses. This proof offered was exactly of the proper kind to impeach their credit. The facts stated in the exceptions were ground for an application to the summary jurisdiction of the court, to set aside the award. (c)

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(a) per cur.
1 Wash. 158.
(b) per Roane j.
2 Hen. & Munf.
413.

(c) Braddick v.
Thompson, 8
East. 344.
Schwartz v.
Thomas, 2
Wash. 167.

Williams, contra. The present doctrine of new trials is comparatively modern. The courts have been gradually improving that branch of practice; and, if reason require further improvement, the courts may well make such further improvement: this is the very genius of the common law. In cases of personal tort, it is now established, that a new trial may be granted for excessive damages, contrary to some old precedents; and by parity of reasoning, a new trial may be granted for inadequacy of damages, notwithstanding other precedents. I apprehend the rule to be now settled, that new trials, in all cases, whether sounding in contract or in tort, whether for excess or smallness of damages, depend, as they ought, on the sound discretion of the court. [Reane, J. Have not verdicts, in actions for personal tort, been likened to verdicts in criminal cases; in which, if a verdict be in favour of the defendant, however improperly, the court cannot interfere?] *Williams.* That was the old ground, founded on the amercement, and *captiatur pro fine*, now obsolete in effect in England, and abrogated by statute here. I insist, that, if the certificate of the judge be correct, (and the defendant did not even except to it,) the jury must, in this case, have been actuated by undue motives, or some gross error or misconception of the subject; which brings this case within the doctrine in 8 East, 256. cited by Mr. Leigh. And surely the reference to arbitration waived the point. In *Leftwich v. Stovall* (d) the court held, that a subsequent submission

(d) 1 Wash.
303, 6.

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v.
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(a) 4 Hen. &
Munf. 363.

to arbitration, by rule of court, obviated an objection for want of a declaration in the cause. In *Brickhouse v. Hunter, &c.* (a) an arbitration was allowed to obviate objections to the jurisdiction of the court where the controversy was pending, and to avoid the bar of a former judgment at law. As to the objection for want of mutuality in the award, in not awarding a release to the defendant; that objection holds only in regard to awards made in pursuance of arbitration bonds, and not at all to arbitrations under rules of court, for reference of a particular suit; the judgment being *per se* a bar to a new action for the same cause. Another objection to the award is, that one of the three arbitrators was not present at the arbitration, nor notified of the time and place thereof. The submission was to the *three*, or *any two*. Both parties were present, and neither objected on the ground that one arbitrator was absent, to the others proceeding in the arbitration; and the objection, if there be any thing in it, should have been made in the court below, where the plaintiff might have controverted the facts on which it was founded; it comes too late in this court. I consider the last objection as an impeachment of the award on the ground of mistake in fact. Now, as to matter of that kind, the award concludes the parties forever; nor can it in that respect be reviewed by the court, unless the arbitrators were guilty of corruption or partiality. (b) The arbitrators were competent to determine on their own knowledge, without any evidence. And the opinion of the court, when it granted the new trial, is confirmation of the justice of their award.

(b) 1 Ves. Jun.
369. 2 Ves.
Jun. 15.

Leigh, in reply. It is said, that the courts have been gradually enlarging their power of granting new trials in order to fulfil the ends of substantial justice. This is true. But then, in every step they have advanced, they have taken care not to run counter to settled rules, and direct adjudications, limiting their discretion; and, in regard to the particular point in controversy, the modern improvements, and the ancient rigor, as I have shewn, go hand in hand, and alike deny to the courts, in cases of personal tort, and especially in actions for criminal conversation, the power of granting new trials for inadequacy of damages. Then, as to the waiver of previous objections, inferred from the subsequent submission to arbitra-

tion, the authorities cited seem by no means conclusive. In *Leftwich v. Stovall*, the main ground, which the court went on, was, that the parties, by submitting their case to arbitration, had waived all objections to the want of *legal forms*; so that the application of that authority to the present case depends on this, whether the granting of the new trial was matter of legal form only? *Brickhouse v. Hunter* was a case in chancery, wherein relief was sought against an oppressive judgment at law; and this court held, that the judgment at law, as well as the suit in chancery, was within the general terms of the submission; and that, therefore, the arbitrators might well make an award according to the very right of the case, notwithstanding the judgment at law. I did not mean to press the objection to the award for want of mutuality; and I shall not examine *Mr. Williams's* distinction on that head. As to the third point; the submission in *Dalling v. Matchett* was exactly like that in the present case; *to three or any two*. Arbitrators constitute a tribunal, and the submission to arbitration, is the commission from which they derive their authority; therefore, it ought to appear, upon the face of the record, that this tribunal of arbitrators was legally constituted according to the submission; either, by shewing that *all* were present; or, if *one* was absent, that he had notice to attend, and declined. On the law touching the last point, I think we are agreed, that the award can only be impeached on the ground of misbehaviour in the arbitrators: but I say, they were guilty of misconduct, and that *Mr. Williams* hardly denies. No confirmation of the justice of the award can be drawn from the opinion of the court of *Amelia*, on granting the new trial; since that opinion might have been founded on the testimony of the very witnesses, whom the defendant might have proven to be unworthy of credit, before the arbitrators, had they not prevented him.

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January 20th. The president delivered the opinion of the court.

"The court is of opinion, that the parties having by *consent*, submitted all matters, in difference between them in this suit, to the decision of the arbitrators in the proceedings mentioned, the principal of which matters was the amount of the

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"damages, which the appellee ought to recover from the appellant; that submission precluded the appellant from contending, that the amount of those damages was conclusively settled by the verdict rendered in the cause, and is a waiver of the objection, that greater damages are given by the award; if that objection would otherwise have been available; according to the spirit of the decision of this court, in the case of *Brickhouse v. Hunter Banks, & Co.* 4 H. & M. 363."

"The court is further of opinion, that, in trying the question submitted to them, comprising as well the fact complained of by the appellee, as the amount of damages thereby alleged to have been incurred by the appellant, the arbitrators ought to have received the evidence, stated in the *third* and *fourth* exceptions to have been offered, and rejected; and that the judgment of the Superior Court is also erroneous, in having refused the appellant permission to shew, if he could, that such testimony was offered to, and rejected by, the said arbitrators."

"The judgment of the Superior Court is, therefore, reversed with costs, and the cause remanded, for the purpose of letting in the testimony last mentioned, (or testimony corresponding with that comprised in either of the said exceptions) if offered; which testimony, if given, is to vacate the said award; and the Superior Court is thereupon to award a new trial, of the issue, before a jury; and, if no such testimony shall be given, that then, and in that case, the said award shall stand good, and judgment be rendered thereupon, in favour of the appellee."

Argued January
19th, 1816.

Cheatwood against Mayo.

Whether, in an action for words, circumstances of suspicion not amounting to full justification, may be proven in mitigation of damages? MAYO brought case for slander against *Cheatwood* in the Superior Court of *Amherst*. The declaration charges, that the defendant said, the plaintiff "*has killed, salted, and eaten a hog; and no one can be hurt for calling him a hog thief; and he is a hog thief.*" Plea, *not guilty*. At the trial, the defendant filed exceptions to the opinion of the court; stating that the defendant offered, in *mitigation of damages*,

and not by way of justification, to prove by a witness, that the witness had lost a hog ; that the witness charged a slave of the plaintiff with having stolen his hog, which the slave denied, saying he knew nothing about it ; that the witness then applied to the plaintiff, to know if he knew any thing about the hog ; on which the plaintiff acknowledged, that a hog of the description given had been killed at his house, agreed it was the witness's hog, and carried him into his smoke-house, and shewed him the hog, which had been cut up and salted : and that the witness told all this to the defendant, before he spoke the words charged in the declaration : but, the court would not allow this evidence to be introduced in mitigation, &c. Verdict and judgment for the plaintiff. The defendant appealed to this court.

JANUARY,
1816.

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v.
Mayo.

Wickham, for the appellant. The testimony excluded by the court, was proper evidence in mitigation :—whether it deserved to have any effect, and what, was matter for the jury. The ancient practice was, that the truth of the words (and much more, I presume, circumstances of suspicion,) might be given in evidence under the general issue ; *Smithies v. Harrison*. (a) The same appears from the case of *Underwood v. Parks* (b) itself ; from which it appears, that the judges, by a sort of legislation, had changed the practice ; the chief justice said, that at a meeting of all the judges, a large majority of them had determined not to allow the truth of the words to be proven in mitigation, for the future, but that it should be pleaded, whereby the plaintiff might come prepared to defend himself, &c. That decision goes no further, than to require of the defendant, if he would avail himself of the truth in his defence, to plead it specially : but it had always been, and it remained, the law, to allow circumstances of suspicion, not amounting to full justification, to be proved in mitigation under the general issue. (c) In *Knobell v. Fuller*, (d) EYRE, C. J. lays down this doctrine as clear law. The opinion of Lord Ellenborough, in *Mullet v. Hutton*, (e) is founded on the same principle, and is to the same effect. It may be objected, that the evidence in this case, did not amount even to matter of suspicion : but, surely, it belonged to the jury to consider of that : and, if it did not amount to matter of suspicion, still,

(a) 1 *Ld. Raym.*
727.
(b) *Str.* 1200.

(c) 6 *Gwynl. Bac.*
Abr. 253 ;
2 *Esp. nt. pri.*
112
(d) *Peake's l. ev*
287. *App.*
XCII.
(e) 4 *Esp. rep.*
248.

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as shewing the circumstances attending the publication of the slander, it was proper evidence to regulate the measure of damages; the circulator being less criminal than the originator of the slander. It may also be objected, that to have allowed this evidence would have been to take the plaintiff by surprise. I answer, that, in slander, the plaintiff must come prepared to vindicate the general tenor of his conduct, and to meet all the circumstances connected with the slander, even on the general issue. So, too, in actions for criminal conversation, the plaintiff must come prepared, on the general issue, to meet imputations upon his own conduct as a husband, and that of his wife before her seduction. In the present case, the circumstances offered to be proved by the defendant were as proper evidence in mitigation, as evidence to shew any other circumstances attending the publication of the slanderous words, would have been; as that they were spoken in heat, in a quarrel between the parties, and after mutual abuse; or the like.

Leigh, for the appellee. Ever since the case of *Underwood v. Parks*, it has been regarded as settled law, that, in an action for words, the defendant cannot prove the truth of the words, in mitigation of damages, under the general issue. There are various matters, more properly of *excuse* than of *justification*, that may be either specially pleaded, or proved in mitigation under the general issue; as that the words were spoken by the defendant as counsel, and were pertinent to his cause; or were spoken in confidence; or in a sense not defamatory, &c. (a.) The principle on which such matters are available under the general issue, is, that while they fall short of full justification, and do not so implicate the plaintiff's character, as that he ought to have notice of the defence, in order that he may bring proof of his own innocency, they tend to acquit the defendant of *malice*: what extenuates guilt is allowed to mitigate punishment. There is, indeed, one authority which seems to go farther; I allude to Mr. *Wickham's* case of *Knobell v. Fuller*, where EYRE, C. J. said, that he had always understood that, in an action for words, the defendant may, in mitigation of damages, give any evidence short of such as would be a complete defence to the action, had justification

(a) 1 Wms.
Saund. 130.
n. 1. 1 Chitt.
plead. 487, 8
Peake's l. ev.
236, 7.

been pleaded. But I must be allowed to doubt this *dictum*; because I can discern no good reason, why the plaintiff should not be apprised by special plea, of any grounds of *suspicion* intended to be adduced against him, that he may come prepared to wipe such suspicion off, when it is admitted he must be so apprised of any *guilt* intended to be imputed to him, that he may have a fair opportunity to repel such imputation; (a) and because this was only a *missi prius* opinion, never reviewed at bar, and perhaps loosely reported; as Mr. Peake has been unable to find a single other case that goes the same length. The case of *Mullet v. Hutton* surely does not. That case turns entirely upon the principle of that class of cases, in which it has been held, that if the publisher of a libel, or of slanderous words, in the libel, or at the time of speaking the words, mention his authority, or name his author, he may prove that he wrote or spoke on such authority, in mitigation, under the general issue; because that evidence discharges him of the malice of originating the scandal. This will be plain when the court comes to examine the case; the libeller there, in the libel, referred to a paragraph in a newspaper by quotation; and the judge said the newspaper referred to might be shewn in mitigation of damages. However, taking the authority of *Knobell v. Fuller*, in its utmost extent, and in the sense in which Mr. Wickham takes it;—still, the only principle on which a defendant may avail himself of grounds of suspicion in mitigation, is, that they tend to acquit him of malice; and the facts proven, must amount only to suspicion of the guilt imputed to the plaintiff; the defendant cannot prove the very and the whole fact, on which he thought himself justified in applying the slanderous epithet to the plaintiff. Now, in the principal case, the evidence offered by the defendant, tended rather to convict him of malice; of inferring a crime against his neighbour from an innocent action; and though, in truth, it was an aggravation of the slander, yet, being offered as mitigation, the jury might have been misled to allow it that effect. In *Lee v. Tapscot* (b) *Pendleton, Pres.* said—"Illegal or improper evidence, however unimportant it may be to the cause, ought never to be confided to the jury; for, if it should have an influence on their minds, it will mislead them; and if it should have none, it is useless, and may at least produce

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(a) vid. 2 Chitt.
plead. 502.
n. d.

(b) 2 Wash.
281.

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perplexity." Again, the evidence offered by the defendant would have amounted to direct and full proof of every fact which he alledged against the plaintiff; for it is plain, that the charge, *that the plaintiff was a hog thief*, was the defendant's inference from the facts, *that he had killed, salted, and eaten a hog, not his own*; which last are the very facts he wanted to prove in mitigation. Was there, then, no way in which the defendant might have been led into the defence, which this proof would have afforded, if indeed it had been available at all? He might have pleaded *not guilty* as to *part*, and *justification* as to the *residue*, or *not guilty* as to the *whole*, and *justification* as to *part*; and so have given the plaintiff a fair opportunity to disprove or explain the misconduct imputed to him. (a) The only remaining ground on which the evidence can be deemed admissible in mitigation, is, that it proved that the defendant spoke the words on the authority of a third person. But that were no excuse, unless he also proved, that, at the time he spoke the defamatory words, he named his

(a) 1 Wms.
Sawnd. 244.
a. n. 6.

- (b) 7 T. R. 17. author;—*David v. Lewis*. (b) Nor unless he spoke only the very words he had heard from another;—*Maitland v. Gold-*
(c) 2 East. 428. *ney*. (c).

Wickham, in reply. It is objected against the authority of *Knobell v. Fuller*, that it was only a *nisi prius* decision, and that there is no other case which goes the same length. It was forgotten, that *Underwood v. Parks* was also a *nisi prius* case, yet its authority was never denied. It having been shewn, that the old practice was to allow even the truth of the words to be proved in mitigation, under the general issue, much more circumstances of suspicion not amounting to full justification; and that the practice was only so far changed, as to require, that the *truth*, if relied on, should be specially pleaded, leaving the practice unaltered in the other respect; it lay with Mr. *Leigh* to produce authority against the admissibility of circumstances of suspicion in mitigation. That he mistakes the principle on which the case of *Mullet v. Hutton* turns, is evident from this, that a reference to an anonymous newspaper paragraph, could not have pointed out to the plaintiff the original author of the scandal, against whom he might lay his action. The reason why the defendant is not bound

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to give notice, by special plea, of an intention to rely on circumstances of suspicion in his defence, is obvious : a special plea, disclosing circumstances of suspicion only, would be bad on general demurrer. Neither could the defendant have pleaded *justification* as to the words, *that the plaintiff had killed, salted and eaten a hog*, and *not guilty* as to the *residue*, (as has been suggested;) because the former words are only matter of inducement, and amount not, of themselves, to any distinct substantive charge. Such a plea had been a mere nullity. I still insist, that the malice which circulates, is not as great as that which originates, scandal ; and that all circumstances, which affect the question of malice, are properly matter of mitigation, if they be such as cannot be used by way of justification. Surely, in the present case, the defendant's guilt had been much less, if the witness had communicated the story about the hog to him, in such a manner, as to leave the impression on his mind, that the witness himself suspected the plaintiff of a felony, than if the communication had been so made, as to leave the contrary impression. Therefore, the manner in which the communication was made by the witness to the party, was proper matter for the consideration of the jury, under the general issue. The cases of *Davis v. Lewis*, and *Maitland v. Goldney*, came on upon demurrers to special pleas of justification : they only decide, that the matters there pleaded, were not bars to the actions, that is, not full justification ; but they do not decide, that the same matters would have been unavailable, if offered in mitigation : they do not, then, touch our question.

Per Curiam. Without assigning any reasons, Judgment affirmed.

Dow against Adam's Administrators.

Argued Decem-
ber 4th, 1815.

WILLIAM WILSON and WILLIAM HERBERT, surviving administrators of *Robert Adam* deceased, brought their actions for the recovery of rent in arrear, it may nevertheless be given under circumstances to be judged of by the jury ; and, in case of a general verdict allowing interest, it shall be intended that sufficient circumstances existed to justify the allowance thereof.

1. Though interest ought not to be given, as of course, in ac-

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action for covenant broken against *Janet Dow*, assignee of *Peter Dow*, in the Superior Court of law of Loudoun county. The declaration was upon an indenture, whereby *Robert Adam*, on the 13th of December, 1785, demised to *Peter Dow*, his heirs and assigns forever, five tracts of land;—the said *Peter* yielding and paying for the same, to the said *Robert*, his heirs and assigns, certain rents, therein reserved, on the days and years therein appointed. The breach assigned was, that, after the death of the said *Robert Adam*, and after the said *Peter Dow* had conveyed the lands in question to the defendant, she failed to pay to the plaintiffs the rents which became due for the years ending on the 25th days of December, in the years 1804 and 1805.

Issue being joined on the plea of covenants performed, the jury found for the plaintiff's, and assessed their damages to the sum of \$1110 67 cents, whereof \$800, the principal sum due, was to bear interest from the 1st day of April 1813, until paid, at five per centum per annum; "if the court should be of opinion that it was competent for the jury to allow interest on the payments reserved under the indenture; there having always been effects on the premises charged, liable to distress, sufficient to have satisfied the said payments; and the said payments having been demanded by the plaintiffs of the defendant, and not having been satisfied. If the court should be of opinion that, under the above circumstances, it was not competent for the jury to allow interest on the said payments reversed as aforesaid, they then assessed the plaintiff's damages to eight hundred dollars."

The Superior Court of law entered judgment for the \$1110 67 cents, with interest as above mentioned; from which the defendant appealed.

Saturday, January 27th, 1816, Judge ROANE pronounced the court's opinion, with an observation of his own subjoined, as follows:—

2. But if the jury state the circumstances in a special verdict, the court should disallow the interest, if under those circumstances, it ought not to be allowed.

3. Interest on rents in arrear ought not to be allowed, the circumstances being that there always were effects on the premises, liable to distress, sufficient to have satisfied the rents, which were not paid, though demanded by the landlord.

* See *Cooks v. Wise*; and *Newton v. Wilson*, 3 H. and M. 463—470.

"The court is of opinion, that although interest ought not to be given, *as of course*, in actions for the recovery of rent in arrear, it may nevertheless be given *under circumstances* to be judged of by the jury; and that, in case of a *general* verdict allowing interest, it shall be intended that sufficient circumstances existed to justify the allowance thereof.—The court is further of opinion that the circumstances stated to the court in this case by the jury are not sufficient to justify the verdict, so far as it allows interest; and that, therefore, the appellee should only recover the principal sum found by the jury. The Judgment is therefore to be reversed, and entered for the principal sum. I will take the liberty to add, (speaking for myself only,) that, while I concur in the above judgment in every other point, I doubt, as at present advised, whether the sufficiency of these circumstances, to justify a refusal of the interest, ought not to be left to the jury in exclusion of the power of the court, under the spirit of the decision of this court in the case of *M'Call v. Turner*." (a)

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(c) 1 Call 133.

Moseley against Jones.

Argued January
29th, 1816.

THE appellee *William Jones, jr.* brought an action of assumption against *Arthur Moseley* trustee for *A. Jones*, on a written agreement, dated the 13th of October 1807, "by which the defendant promised to return to the plaintiff, on or before the 1st of January 1811, 55½ barrels of corn, with interest, also to pay him the sum of 11l. 8s. 7d. with interest from the 14th of January 1806, on or before the 1st day of January 1811." No consideration for the promise was set forth in the declaration. The defendant pleaded *non assumpsit*, and, (after the verdict for the plaintiff for 65l. 8s. 7d. damages,) moved in arrest of judgment, on the ground that the declaration was defective in not stating a sufficient consideration and promise; which motion being overruled by the court, and judgment rendered according to the verdict, he appealed to this court.

1. In the action of *assumpsit*, if no consideration for promise be laid in the declaration, judgment ought to be arrested, notwithstanding it be founded on a written agreement. See *Hall v. Smith, Young & Hyde*, 3 *Munf.* 550.

The case was submitted by the appellant's counsel; no counsel appearing for the appellee.

JANUARY,
1816.

Moseley
v.
Jones.

Monday, January 29th, 1816, Judge ROANE pronounced the court's opinion that the judgment was erroneous, there being no consideration laid in the declaration.

Judgment reversed, and entered that the appellee take nothing, &c.

Argued January
27th, 1816.

Dunbar against Beale.

1. If the case IN an action for assumpsit, in the county court of Fau-
be clear against quier, for goods sold and delivered, &c. (the declaration con-
the party ten- sidering a demur- taining also a count upon an *insimul computassent*, and the plea
rer to evidence, being *non assumpsit*.) the plaintiff proved, by a single witness,
the court may " that some time ago, (the precise time he did not recollect,
refuse to compel " he met with the defendant, in the court house yard, on a court
the other party to join. " See " he met with the defendant, in the court house yard, on a court
Thwaitt & Hin- " day, and called upon him to execute his bond to the plaintiff,
ton v. Finch, 1 " for a large account, amounting to about 120*l*. ; to which the
Wash. 220. " defendant replied, that he expected to receive some money,
S. P. " for land which he had sold, in about six weeks, when he

2. What evi- dence is suffi- cient to establish an acknowledg- ment of, and promise to pay, a debt by ac- count. " would go down to the plaintiff and settle the account with
" him, and would pay it off. The witness believed that he
" showed the defendant the account, (but of this he was not
" certain,) and that the defendant did not then examine the ac-
" count, (which was composed of a large number of items,)
" but made no exceptions to it."

This being all the evidence exhibited to the jury, the defend-
ant offered a demurrer to the evidence, in which the plaintiff re-
fused to join ; whereupon the defendant by his counsel moved
the court to compel him to do so, which motion was overruled
by the court, upon the ground that the "matter offered in evi-
" dence in manner aforesaid, *was too plain*." The defendant
excepted to the court's opinion, and, a verdict being found and
judgment rendered against him, appealed to the Superior
Court of law. The judgment was there reversed, and the ver-
dict set aside, with a direction that the plaintiff do join in the
demurrer. By consent of parties, the cause was retained in that
court for farther proceedings ; and, the demurrer to the evi-
dence being argued, judgment was pronounced in favour of the

defendant, "that the plaintiff take nothing," &c.; from which judgment, the plaintiff appealed to this court.

JANUARY,
1816.

Monday, January 29th, 1816, Judge ROANE pronounced the court's opinion, that both the judgments of the Superior Court of law be reversed, and that of the county court affirmed.

Deabar
v.
Beale.

Taylor against Ficklin & others.

Argued, Tuesday, March 14, 1815.

BENJAMIN FICKLIN, being employed by William Oden, as his agent, to collect a debt from Beverly R. Waggoner, took a bill penal for the same, amounting to \$257,30 cents payable to himself. Oden assigned to Benjamin Botts, for valuable consideration, "the debt due to him from Waggoner, or Ficklin, as the case might be, to secure which a bond was given by Waggoner to Ficklin," authorizing Mr. Botts "to use his name at his pleasure in the recovery;" "but he (the assignor) was not to be answerable for the insolvency of the debtor." Botts afterwards assigned the same bill penal to Thomas Taylor for valuable consideration. Waggoner, the debtor, after executing the bill penal, made a deed of trust conveying all his property, real and personal, to John Gibson, sen. for payment of his debts in the first place, for his own support during life in the second, and, afterwards for the benefit of his wife, &c.; which deed was duly recorded. Before the date of that deed, Ficklin bought a tract of land of Waggoner, whereupon they entered into articles of agreement, binding the purchaser to pay a part of the purchase money when a deed should be made him, and the balance in two annual payments.

A bill was filed by Taylor, assignee as aforesaid, in the Superior Court of Chancery for the Richmond district, against Gibson the trustee, Margaret Waggoner and her infant daughter his cestuy que trusts, and Ficklin Oden and Botts defendants; setting forth the circumstances above mentioned, and also that

1. A man indebted by bond executed a conveyance of all his property in trust, for payment of his just debts in the first place; for his own support during life in the second; and, afterwards, for the benefit of his wife, &c. He died, without any will or property acquired after the date of such conveyance; and no person administered on his estate. It was held, that an assignee of the bond was not restricted to his remedy at law against the assignor, but, without bringing any action at law, might obtain relief in equity by a decree of a sale of the property in the hands of the trustee.

2. In such case, if the

fund in the possession of the trustee prove insufficient, the plaintiff in equity may recover the balance of his claim from a debtor of the obligor; and, in default of both these funds in whole or in part, he may proceed against the assignor.

3. And, it seems, that all the persons concerned being made parties, the court may do complete justice in one suit, and make a full end of the whole controversy.

MARCH,
1816.

Taylor
v.
Ficklin and
others.

Waggoner the debtor had died, without any will or estate acquired after the execution of the said trust deed, and no person had administered on his estate; that possession of the land purchased by *Ficklin* was delivered to him at the time of executing the articles of agreement between him and *Waggoner*; but, before he tendered a deed to *Waggoner*, the latter died; and so the said *Ficklin* had ever since held the property and enjoyed it, without a deed, and without applying to the trustee for one. The plaintiff therefore prayed that the said *Gibson* be decreed to execute a deed to *Ficklin*, and that he be decreed to pay to the plaintiff the amount of his claim with interest; or, if that resource should fail, that then the said trustee be compelled to execute his said trust, by the sale of so much as would pay the same; and for such other relief as the nature of his case might require.

The defendants, by their several answers, admitted the allegations in the bill; except that nothing was said in *Ficklin's* answer concerning his being in possession of the land; which fact he neither admitted, nor denied, though charged expressly in the bill. He contended that, as no deed had ever been made him, he was not bound to pay any interest on the purchase money; while *Gibson*, in his answer, insisted that *Ficklin* having been in possession from the date of the contract, enjoying the profits without paying the purchase money, ought to be compelled to pay interest upon it.

Chancellor TAYLOR, "not discerning how the plaintiff can be interested in obtaining a deed for the defendant, *Benjamin Ficklin*, for the land sold to him by *Beverly R. Waggoner* as appears by their agreement of the 17th of July 1807, among the exhibits aforesaid, nor why the plaintiff should come into this court, as the said *Benjamin Botts* is the only person named in the transaction that is liable to him for the non payment of the assigned bond in the bill mentioned," therefore adjudged, ordered and decreed, that the bill be dismissed with costs.

From this decree the plaintiff appealed.

Wirt for the appellant.

Williams for the appellee, *Ficklin*.

February 1st, 1816. Judge ROANE pronounced the court's opinion.

MARCH,
1816.

The court is of opinion that the decree of the chancellor, dismissing the bill of the appellant, is erroneous, and should be reversed with costs; and this court proceeding, &c. it is further decreed and ordered, that the appellee, *John Gibson*, pay to the appellant, out of the trust subject in his hands, in the proceedings mentioned, the principal sum and interest claimed by the bill, with the costs in the Court of Chancery; and that the said trustee shall, if necessary, sell as much thereof, on reasonable notice, as may be sufficient to satisfy the same. The court is also of opinion, and hereby decrees, that, in default of the other part of the said trust fund, the appellant may, by causing the appellees to interplead, or otherwise, proceed against the appellee *Ficklin*, to recover so much of his debt as may be unpaid from the trust fund aforesaid; and, in default of both these funds, either in the whole or in part, that he shall have like liberty to proceed against the representatives of *Benjamin Botts*. And the cause is remanded to the Court of Chancery to be proceeded in pursuant to the principles of this decree.

Taylor
v.
Ficklin and
others.

Buster against Ruffner.

Decided, Feb.
2d, 1816.

THE appellee brought an action of *assumpsit* against the appellant in the Supreme Court of *Kanawha* county. The declaration began with the words, "*Virginia, Mason county*, to wit, *Joseph Ruffner* complains of *Claudius Buster*, in causing, &c. for that whereas the said *Claudius*, to wit, on the 1st day of January 1812, at the county aforesaid, was indebted to the said *Joseph*, &c."; in the usual form; containing three counts, viz. one, in general terms, for money had and received by the defendant, to and for the use of the plaintiff; another, more specially, for money had and received, in like manner, for the sale of a negro man slave, the property of the plaintiff; and another upon a *quantum valebat* for the price

1. In an action of *assumpsit* in the Superior Court of a county, the declaration's laying the venue in a different county, and omitting to state that the cause of action arose within the jurisdiction of the court, is not error sufficient in arrest of judgment. See *Turberville v. Long*, 3 H. & M. 309.

2. A general verdict in *assumpsit*, assessing entire damages, on several counts, none of which are defective, is not erroneous. See *Tidd's Pr.* 801—2.—*Lloyd v. Morris*, *Willis*, 443, and *Rev'd. Code*, 1st vol. ch. 76, sec. 38, p. 112.

FEBRUARY,
1816.

Buster
v.
Ruffner.

of a negro man slave sold and delivered by the plaintiff to the defendant. . On the plea of *non assumpsit*, a general verdict was found for the plaintiff, *entire* damages being assessed: whereupon, the defendant filed errors in arrest of judgment; to wit, "that the declaration is filed as in the county of *Masson*, and there is no jurisdiction given to this court in said "declaration; that there are two counts, and a verdict returned for three hundred dollars, without designating on "which of the counts the jury found." The Superior Court entered judgment for the plaintiff according to the verdict; which judgment was affirmed by the Court of Appeals, on the 2d of February, 1816.

February 6,
1816.

Thomas against Soper.

1. Although, in the case of an absolute deed of slaves, where the grantor remains in possession after the execution and recording of the same, such deed is to be regarded as fraudulent and void as to creditors and subsequent purchasers, yet the same is obligatory, and cannot be impeached, as between the grantor and grantee and their representatives. See *Alexander v. Deneale*, 2 *Munf.* 341; *Guy v. Mosley*, *ibid.* 543.—*Robertson v. Ewell*, 3 *Munf.* 1.

IN an action of detinue for sundry slaves, the plaintiff *John Soper* offered in evidence, in support of the issue joined on his part, an absolute deed, duly recorded, from *James Thomas*, sen. (of whose estate the defendant *Joel Thomas* was administrator,) to himself, of the slaves in question: whereupon, the defendant offered to impeach the validity of the said deed, as fraudulent and without good or valuable consideration, by testimony, first that *James Thomas* the vendor held the possession of all the negroes in the declaration mentioned from the time of executing the said deed to that of his death; secondly, that *Joel Thomas* the defendant, qualified as one of the administrators of the said *James* and that the negroes in the declaration mentioned, came to his possession as administrator of the said *James Thomas*; after which the defendant offered to prove that executions against the estate of the said *James Thomas* had been returned, by the sheriff, "that there were no goods and chattels of the intestate to be found in his bailiwick;" to the admission of which *parol* proof, the plaintiff, by his counsel objected, and the court sustained the objection. The defendant then moved the court to instruct the jury that the said deed was fraudulent as aforesaid; which instruction the court refused to give, and instructed the jury that, "although in the case of an absolute deed for negroes, where the vendor

“remains in possession after the execution and recording the same, such deed, as to creditors and subsequent purchasers, is to be regarded as fraudulent and void; yet, as between the vendor and vendee, and their immediate representatives, it was obligatory, and could not be impeached by the testimony offered by the defendant as administrator of the grantor, which defendant was not himself a creditor.” To this opinion of the court, a bill of exceptions was filed; and, a verdict being found, and judgment rendered for the plaintiff, the defendant appealed to this court, which, on the 6th of February, 1816, affirmed the judgment.

FEBRUARY,
1816.

Thomas
v.
Soper.

Sims's administrator against Lewis's executor and others. February 7th, 1816.

UPON an appeal from a decree of the Superior Court of Chancery for the Richmond District.

The bill was filed in the late High Court of Chancery, by *Jesse Sims* against *John Lewis*, acting executor of the last will and testament of *Warner Lewis* the younger, deceased, the said *John Lewis* and *Wilson C. Nicholas* trustees in a deed executed by the said *Warner* in his life time, and *Courtney Lewis* his widow, and *Courtney Lewis* the younger and *Elizabeth Lewis* his children; the said deed of trust being executed for the purpose of paying his lawful debts, and, after paying the same, of making provision for the said widow and children.

The object of the bill was to obtain satisfaction for an alleged failure on the part of the said *Warner Lewis* to make a good title to certain lands, situate on the north west of the river Ohio, which he sold to a certain *John B. Armistead*, of whom the plaintiff purchased, and afterwards obtained from the said *Warner Lewis* a bond to make him a title.—The plaintiff prayed a decree for the full value of the lands with interest;—for a sale of the trust property to satisfy the same, with the costs of this suit;—and for such other and further

1. A purchaser of land, suing for breach of a contract to make a good title, may with propriety come into a court of equity for pecuniary compensation, instead of proceeding at law in the first instance;—if the vendor has conveyed away his property in trust, whereby there might be a difficulty in obtaining satisfaction of his judgment when recovered;—the vendor, or his lawful representative, together with the trustees and cestuys que trusts, being made defendants to the bill.

2. In such case, the proceeding in equity

is proper, also because it avoids circuity of action, and the court has the power of directing an issue to try by a jury the justice of the plaintiff's claim.

3. Where a plaintiff in equity sues to take advantage of a contract found to be fraudulent, he is not to be sustained even to recover back money paid on such contract, but ought to be left to whatever remedy he may have at law.

FEBRUARY, 1816. relief as should be consistent with equity, and the nature of his case might require.

*Sims's admr.
v.
Lewis's executor and others.*

The defendant *John Lewis*, by his answer, insisted that the contract originally made between *John B. Armistead* and *Warner Lewis* was obtained by *fraud* on the part of the former, in taking advantage of the latter, when intoxicated and incapable of business; and that said *Warner* was, in like manner, *fraudulently* and *deceitfully* induced by the said *John B. Armistead* to execute the title bond mentioned in the bill.—He therefore prayed, that all bonds, deeds and covenants, relating to the premises, be set aside.

Sundry depositions were taken on both sides, the general tendency of which was to support the allegations in the answer.

On the 14th of March, 1806, the cause came on to be heard, when Chancellor WYTHE directed, “that a jury be empannelled to inquire and say, not what is the *value* of the land “in the bill mentioned, to which value the plaintiff supposeth “himself entitled, but *what damage* the plaintiff hath sustained “by breach of the condition of the bond, or obligation, of “*Warner Lewis* among the exhibits; and whether both the “deed for the land in controversy to *John B. Armistead*, and “the bond given for the conveyance to *Jesse Sims* by *Warner Lewis*, or *either of them*, were not obtained by *fraud*, or by “an *improper advantage* taken of the situation of the said “*Warner Lewis*; and that the said jury’s inquisition and verdict be certified, &c.”

In obedience to this order a verdict was found, and certified to the Court of Chancery, “that the deed (*if there ever “was one*) to *J. B. Armistead*, as well as the bond of conveyance to *Jesse Sims*, were obtained by taking an improper advantage of the said *Warner Lewis’s* situation.”

Chancellor TAYLOR, afterwards, “being of opinion that the “deed of trust in the bill mentioned, can in no manner affect the plaintiff’s remedy at law upon the bond of the 4th “of August, 1797,” dismissed the bill, “*without prejudice* to “*any remedy at law*”:—from which decree the plaintiff appealed.

February 7th, 1816, Judge ROANE pronounced the court’s opinion.

This court is of opinion that the original contract of sale by *Warner Lewis* to *J. B. Armistead* of the land in controversy, as well as the bond given by the former to *Jesse Sims*, is impeached of fraud by the answer of the appellee *John Lewis*, and put in issue by the parties;—that the issue directed in this case extends as well to the one transaction as to the other; and that the finding of the jury under that issue, taken in connexion with the pleadings and facts proved in the cause, is sufficient to justify a decree setting aside both contracts; more especially, as that verdict is supported by the evidence in the cause, and may have been founded, in part, on evidence not spread upon the record.

FEBRUARY,
1818.

Sims's admr.
v.
Lewis's executor and others.

The court is farther of opinion, that the appellant's intestate *Sims* came properly into a Court of Equity, instead of proceeding at law, in the first instance, for damages;—on the ground that *Warner Lewis* had conveyed away his property in trust, whereby there might be a difficulty in obtaining satisfaction of his judgment when recovered; and that there is no objection to the proceeding, as he included the executor of the said *Warner*, as a defendant, who was competent to contest the justice of the claim; and that this proceeding, while it avoids a circuity of action, obviates the objection, which strongly exists, in favour of the preference of jury trial, in consequence of the power of the Court of Chancery to have the justice of the debt tried by an issue, as was done in the case before us.

The court is farther of opinion that, as both the transactions aforesaid have been found to have been made under circumstances of imposition sufficient to set aside and vacate the same in a Court of Equity, the appellant ought not, when coming into that court as a *plaintiff*, to be sustained even to recover back money paid under either of the said contracts; but that, if he has any right thereto, he ought to be left at law to recover the same.

On these grounds the decree is affirmed.

February 7th,
1816.

. Carrington against Anderson.

1. By virtue of the act of Assembly concerning the sheriff, passed the 8th of February, 1808, (Rev'd. Code, 2d vol. p. 180) any person claiming the property sold under an execution may prosecute an action of debt on the bond of indemnity, in the name of the sheriff or other officer to whom it was taken, without proving that any damage has been sustained by such officer.

2. The deputy sheriff, who sold the property under the execution, is not a competent witness, in an action in the name of the high sheriff upon the bond of indemnity, to prove that, in fact, the property was that of the person against whom the execution was issued.

THE declaration, in this case, being founded on an act of Assembly of considerable importance, and having stood the test of the Court of Appeals, it may be useful to many practitioners of law to insert it entire :—

“Cumberland county, to wit :—*Codrington Carrington*, late sheriff of Cumberland, who sues for the benefit of *John Hudson*, complains of *Francis Anderson* and *John Ballow*, defendants, in custody, &c. of a plea that they render to him the sum of one hundred pounds, which they to the plaintiff owe, and from him unjustly detain; for that, whereas, by an act of the General Assembly of Virginia, passed the 8th day of February, 1808, entitled, ‘an act concerning sheriffs,’ it is enacted that, if any sheriff or other officer shall levy an execution on property, and a doubt shall arise whether the right of such property is in the debtor, or not, such sheriff or other officer may apply to the plaintiff, his attorney, or agent, for his bond, with good security, for indemnification for the sale of the property seized; and, also by the said act, among other things, it is enacted, that any person claiming such property may, in the name of such officer, prosecute his suit on the bond, and recover such damages as the jury may assess; and whereas the said *Ballow*, on the day of in the year 1808, had delivered a certain writ of execution, called a *fi cri facias*, to *Samuel Hobson*, who was then and there deputy sheriff of the said plaintiff, which execution was to be levied of the goods and chattels of a certain *Thomas Hudson*; and the said *Samuel Hobson* having levied the said execution on a horse;—and the said *John Hudson* having, on the day of in the year 1808, set up a claim to the said horse, whereby a doubt arose whether the right of such horse was in the said *Thomas Hudson*, or the said *John Hudson*; and the said *Samuel*, as deputy sheriff, having required bond and security, of the said *John Ballow*, for indemnification for the sale of the said horse so seized; the said defendants, on the 14th day of April, 1808, in the same county, by their writing obligatory, sealed with their seals,

" and to the court now shewn, bound themselves to pay all
 " costs and damages, under the penalty of one hundred pounds;
 " and the plaintiff saith, the said horse was in fact the horse
 " and true property of the said *John Hudson*, and was not lia-
 " ble to be sold under the said execution, which the said de-
 " fendants caused the said deputy to do, by entering into the
 " said bond; whereby the defendants became bound to pay
 " such damages as the jury should assess; and the plaintiff
 " saith, that the said horse was worth, and the said defend-
 " ants are liable to pay to the said plaintiff, for the said *John*
 " *Hudson*, the sum of one hundred dollars,—of which the de-
 " fendants had notice; yet the defendants to the plaintiff
 " have refused to pay the said one hundred dollars, either to
 " the plaintiff or to the said *John Hudson*, although often re-
 " quired; and so the defendants became bound to pay to the
 " plaintiff the said sum of one hundred dollars; yet the said
 " defendants have not paid to him the said sum, but the same
 " to pay to the plaintiff have refused, although often required,
 " and still do refuse; to the plaintiff's damage \$100, and he
 " bring suit, &c. for the said *John Hudson*."

FEBRUARY,
 1816.

Carrington
 v.
 Anderson.

The suit having abated as to the defendant *John Ballou*, the other defendant *Francis Anderson* pleaded "*not guilty*," and, on the trial, introduced *Samuel Hobson*, the deputy sheriff aforesaid, to prove that the horse in the declaration mentioned was, at the time of the sale, the property of *Thomas Hudson*, and not the property of *John Hudson*. The plaintiff by his counsel made a motion to exclude the evidence of said *Samuel Hobson*, because he was the acting sub-sheriff at that time, took the indemnifying bond on which this suit was brought, and made the sale of the horse in the declaration mentioned, under an execution, which was set forth in *hæc verba*: which motion by the plaintiff was sustained by the court;—whereupon the defendant filed a bill of exceptions.

A motion was then made by the defendant, to the court to instruct the jury, that, unless it appeared to them, from evidence, that the sheriff, or his deputy in the declaration mentioned, had been *injured*, or *sustained damages*, in consequence of the sale of the horse in the declaration mentioned, the issue joined must be in favour of the defendant;—as no action could be sustained on the bond in the declaration mentioned against the defendants, unless the sheriff or his deputy had suffered;

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v.
Anderson.

which instruction the court refused to give; and thereupon the defendant again excepted to the court's opinion.

The jury returned a verdict for the plaintiff, for the debt in the declaration mentioned, to be *discharged* by the payment of fifty two dollars *damages*; and a judgment was entered accordingly; to which a writ of *superseatas* was granted, and the same was reversed by the Superior Court of law, "because an action cannot be sustained on the bond in the declaration described, upon the breach therein alledged, for the benefit of the claimant; nor can any action be sustained thereon, until the plaintiff, or his deputy, shall have sustained an injury from the sale of the property mentioned therein." For these reasons, the Superior Court directed judgment to be entered for the plaintiff in error; from which the defendant in error, (that is, the plaintiff originally,) appealed to this court,—where, on the 7th of February, 1816, the judgment of the Superior Court of law was reversed, and that of the county court affirmed.

February 9. Howatt & Company *against* Davis & Chalmers.
1816.

1. In case of a sale of personal property not executed by delivery, but to be consummated by delivery at another place; although, in consequence of earnest paid, or otherwise, the property be so vested in the buyer, that, on complying or offering to comply with the contract on his part, he may recover the same from the seller or his agent; yet, until delivery, and while the goods are (in legal phrase,) *in transitu*, the seller may, on the buyers becoming bankrupt, or being likely to be so, arrest the goods, or order his agent to arrest them; which order, operating as an indemnity to the agent in addition to that arising from his possession of the goods, will be his guarantee for refusing to deliver them, and, perhaps, under circumstances, the agent would also have a right to demand other security from his principal, which it would be incumbent on him forthwith to give, under pain of a right in the agent to go on, and execute the contract by a delivery.

2. If a factor, or agent, having sold goods belonging to his principal, be ordered by him while they are yet *in transitu* not to deliver them to the buyer, of whose solvency doubts are entertained, and he deliver them notwithstanding such order, and without demanding security for his indemnity; the principal is entitled to an action against him, in case the buyer should prove insolvent.

3. And such right of action is not waived or abandoned by expressions used in letters from the principal after the delivery of the goods, seeming to import an agreement to look to the buyer for payment, and not to the factor; nor by the principal's permitting considerable time to elapse before he informs the factor, categorically, that he will look to him, and not to the buyer for satisfaction; provided such expressions and such delay, on the part of the principal, may have been occasioned by the factors failing to make a full and fair disclosure of all facts and circumstances necessary to enable the principal to decide upon the subject, and which it was the duty; and in the power, of the factor to have given.

" *Chalmers*, complained of *James Howatt*, *James Thorburn* and
 " — *Donaldson*, trading under the firm of *James Howatt &*
 " *Company*, in custody, &c. of a plea of trespass on the case,
 " for that, whereas, on the 30th day of July, in the year of our
 " Lord 1802, and from that time to the present day, the said
 " plaintiffs, were merchants trading as partners, and residing in
 " the town of *Petersburg*, in the state of *Virginia*, and the said
 " defendants, on the said 30th day of July; in the year of our
 " Lord 1802, and from that period, 'till the present day, were
 " *commission merchants* and partners, residing in the borough of
 " *Norfolk*, in the state of *Virginia*, there carrying on business
 " as agents and factors, for a reasonable and accustomed com-
 " mission or compensation to be paid to them by those who
 " employed them as factors or agents to sell and dispose of the
 " property of those principals or constituents; and, by the law
 " of the land persons acting as factors and agents aforesaid, are
 " bound to obey all the legal and proper orders and instructions
 " of their principals and constituents; and whereas the said
 " plaintiffs, on the said 30th day of July, being possessed of
 " 50 hogsheads of tobacco, of *Petersburg* inspection, on the
 " same day and year, in the borough of *Norfolk*, within the
 " county of *Norfolk* aforesaid, delivered the said 50 hogsheads
 " of tobacco into the hands and possession of the said defend-
 " ants, as their agents and factors, to be disposed of by them
 " for a reasonable and accustomed commission and compensa-
 " tion, to be paid to them by the plaintiffs, and in conformity
 " with certain legal and proper orders and instructions given
 " by the plaintiffs to the defendants; yet the said defendants,
 " acting as agents and factors aforesaid, afterwards, to wit, on
 " the 6th day of August, in the year of our Lord 1802, at *Nor-*
 " *folk* aforesaid, contrary to the legal and proper orders and in-
 " structions of the plaintiffs, did dispose of the said 50 hogs-
 " heads of tobacco;—and whereas, by the law of the land, an
 " agent and factor is bound to obey every legal and proper or-
 " der and instruction of his principal; and whereas the said
 " plaintiffs, on the 30th day of July, in the year of our Lord
 " 1802, being merchants residing in *Petersburg*, did constitute
 " and appoint the said defendants (who then were and still are
 " merchants residing in *Norfolk*.) their agents and factors to
 " sell and dispose of 50 other hogsheads of tobacco of the *Pe-*

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sers.

“*Norfolk* inspection, for the benefit of the said plaintiffs; and
 “the said defendants, acting as agents and factors aforesaid,
 “for a reasonable and accustomed commission and compensa-
 “tion, on the 10th day of August in the same year, at *Nor-*
 “*folk*, within the county of *Norfolk* aforesaid, and the jurisdic-
 “tion of the court, did contract with *John Comper & Company*,
 “(then merchants in good credit residing in *Norfolk*,) to sell
 “to the said *John Comper & Co.* the said 50 hogsheads of to-
 “bacco, at the price of 29 shillings per hundred weight, for
 “which the said defendants were to receive of the said *John*
 “*Comper & Co.*, 50 barrels of pork, at the rate of \$15 per bar-
 “rel, and to accept the promissory note of said *John Comper*
 “& *Co.* payable at three and four months after the delivery of
 “the tobacco, for the residue of the purchase money of the
 “tobacco; and, afterwards, on the same day and year at *Nor-*
 “*folk* aforesaid, the said defendants received of the said *John*
 “*Comper & Co.* the said 50 barrels of pork; and whereas, af-
 “terwards, to wit, on the 31st day of August, in the year of
 “our Lord 1802, at which time the said 50 hogsheads of tobacco
 “had not been delivered to or come into the possession of the said
 “*John Comper & Co.*, but were still in the possession of the de-
 “fendants, as agents and factors of the plaintiffs, the said Chal-
 “sers & Davis, having after the contract made as aforesaid,
 “ascertained that the said *John Comper & Co.* subsequent to the
 “said contract, were injured in their mercantile credit, and in
 “fact had become insolvent, did order and direct the said de-
 “fendants not to deliver the said tobacco to the said *John*
 “*Comper & Co.*, unless the said *Comper & Co.* would give
 “approved endorsers on their notes for the balance of the pur-
 “chase money of the tobacco;—yet the said defendants, not-
 “withstanding the instructions and orders aforesaid, and in
 “opposition thereto, did deliver the said 50 hogsheads of to-
 “bacco to the said *John Comper & Co.*, afterwards to wit, on
 “the 6th day of September, in the year of our Lord 1802, at
 “*Norfolk* aforesaid, in the said county of *Norfolk*, although
 “the said *John Comper & Co.* did not give an indorser on their
 “notes, or otherwise secure the payment of the balance of the
 “purchase money of the tobacco; and although, as the plain-
 “tiffs aver, the said *John Comper & Co.* were insolvent on the
 “6th day of September, in the year 1802; by reason of which

" premises, the plaintiffs have sustained damage to the value
" of four thousand dollars, and therefore they produce the suit."

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The defendants pleaded "*non assumpsit*," and issue was joined. After which, the parties, by their counsel, agreed a case, in lieu of a special verdict, stating the facts in such manner as, *in substance*, corresponded with the allegations in the second count of the declaration; and with what is said in the following opinion of this court; and consenting that, if, upon the whole matter, the court should be of opinion that the law was for the plaintiff, judgment should be entered for him for three thousand seven hundred and three dollars and ninety cents, damages;—if not, then for the defendant.

The District Court pronounced judgment, accordingly, for the plaintiff;—from which the defendant appealed.

The cause was argued in January, 1815, by *Wickham* for the appellants, and *Call* and *George K. Taylor* for the appellees.

February, 9th, 1816. Judge ROANE pronounced the court's opinion.

The court is of opinion, that, by the general principles of law, a factor or agent is bound to pursue the lawful instructions of his principal; and that, by his agent, a principal can do any act, in relation to the subject delegated, which he might lawfully do by himself. The court is farther of opinion that, in case of a sale of personal property not executed by delivery, and to be consummated by a delivery at another place, although in consequence of earnest paid, or otherwise, the property is so vested in the vendee, that, on complying or offering to comply with the contract on his part, he may recover the same from the vendor, or his agent; yet that, until delivery, and while the goods are, in legal phrase, *in transitu* the seller may, on the vendee's becoming bankrupt, or being likely to become so, arrest the goods, or order his agent to arrest them; which order, operating as an indemnity to the agent, in addition to that arising from his *possession* of the goods, will be his guarantee for refusing to deliver them; and that the agent would also have a right, perhaps, under circumstances, to demand other security from his principal, which it would be incumbent on him forthwith to give, under pain of a right in the agent to go on, and execute the contract by a delivery.

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Under the influence of these principles, the court is of opinion, that it was the duty of the appellants to have complied with the order of the appellees in this case, by refusing to deliver the tobacco to *John Comper & Co.*, which is stated and referred to in the case agreed.

The court is farther of opinion, that the appellants not having done this, but, on the contrary, having violated the said order by a delivery of the tobacco to *Comper & Co.*, they were liable to the action of the appellees, in the event of *Comper's* insolvency, to make them reparation in damages; which right of action, however, might be waived and abandoned by the appellees, after a full and fair disclosure of all facts and circumstances necessary for their decision upon the subject, which it was the duty and in the power of the appellants to have given. The court, referring to the facts agreed in the case in relation to this point, is of opinion that, although, standing singly, there may be some expressions, seeming to import an agreement by the appellees to look to *Comper & Co.*, and not to the appellants, for payment, used in their letters written after the delivery of the tobacco by the appellants to *Comper & Co.*; and although a considerable time elapsed before the appellees stated, categorically, to the appellants, that they should look to *them*, and not to *Comper & Co.* for satisfaction; these circumstances are not strong enough to induce the court to infer such waiver and abandonment in the present instance.

The case states that, at the time of the delivery of the tobacco, *John Comper & Co.* were "*in fact insolvent*, though this "*was not then CERTAINLY known to the appellants.*" Although this was not *certainly* known to them, we are authorized to *infer* from the case, that the appellants had, on the 6th, (when the tobacco was delivered,) *good-reason to believe* that such insolvency existed; and if so, while it formed an additional reason for the appellants to decline a delivery of the tobacco, they ought also, *even then*, to have given this information to the appellees. This is a stronger degree of evidence, in relation to a bankruptcy, than a mere protest of bills, which may happen sometimes to men of the best mercantile credit. The last circumstance, however, only, and not the other and stronger evidence from which the appellants *knew*, though they did not *certainly* know, that *Comper & Co.* were then insolvent, was commu-

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nicated by the appellants to the appellees; and that, too, accompanied by some expressions indicating a hope that *Comper's* affairs might not be so bad as was apprehended. It was under this degree of information that the appellees acted in using the expressions now referred to. But, at any rate, after the 8th of September, when it is agreed that *Comper & Co's.* insolvency was *ascertained*, and that they had *stopped payment*, it was the duty of the appellants to have given instant information thereof to the appellees. For want of such information, and from the character of the appellants' letters, the appellees may have been lured into a belief that they might get payment from *Comper & Co.* Hence the expressions in their letters now referred to may have arisen; and hence, also, the delay in stating to the appellants that they looked only to them in this business. Both this delay, and these expressions, may therefore have arisen from the conduct of the appellants, in withholding or palliating the actual circumstances of the case; and therefore ought not to avail them in the present instance. There has not been such a prompt, frank, and explicit communication on their part, as should, on the ground of these expressions and this delay, absolve them from a right of action which had previously attached against them.

On these grounds, the court is of opinion to affirm the judgment.

Beatty against Smith and others.

Saturday, Feb-
ruary 10, 1816.

IN an action of debt in the Superior Court of Wythe county, the plaintiff *Beatty* declared upon a writing obligatory, sealed, &c. by the defendants *John Smith, Andrew Kincannon* and *Joseph Bell*, for the sum of \$140, payable on the

1. In debt on a bond, if the declaration describe it as a writing obligatory for a sum of money; and the defendant,

without praying oyer of the bond, plead payment, and also several other pleas, alleging performance of a condition, according to which the bond was to be discharged, by the delivery of a certain quantity of iron; and, issue being joined thereupon, the parties go to trial; and it appears, by bills of exceptions, that the evidence before the jury did not apply to the plea of payment, but to the other pleas only; a verdict for the defendant ought to be set aside, and a new trial awarded, with leave to him to take oyer of the condition of the bond, and plead *de novo*;—all his pleas, except that of payment, being irrelevant to the claim set out in the declaration, and, therefore, the issues joined upon them being immaterial. And this is the case, notwithstanding a copy of a bond, corresponding with that described in the pleas, be inserted in the transcript of the record, and certified by the clerk to be the bond on which the declaration was filed.

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first day of April 1811, in the usual form. A writing obligatory was inserted by the Clerk in his transcript of the record, and certified by him to be the bond on which the declaration was filed:—*but without any praying of Oyer by the defendants*;—which writing appeared to be for the sum of \$140, “to be discharged by the payment of *one ton of good merchantable bar iron, assorted, at Rufus Morgan’s in Abingdon, for value received.*”

The defendants pleaded payment; and, afterwards, by leave of the court, three other pleas; viz. 1st, that, “on the said first day of April 1811, they did deliver at *Rufus Morgan’s* one ton of iron pursuant to the tenor and effect of the *said note in writing*, whereby the same became discharged; and this they are ready to verify;—2d, that, before and on the first day of April 1811, they were ready to deliver the *said ton of iron* according to the tenor and effect of the *said writing*; but that the plaintiff had no agent at the place mentioned to receive the same; and this, &c.: 3d, that the plaintiff, by the tenor and effect of the *said writing*, appointed the said *Rufus Morgan* his agent, so far as respected the receipt of the iron; and that the defendants did deliver at the said *Rufus Morgan’s* one ton of iron in discharge of the *said writing*, which the plaintiff has received; and this, &c.”—The plaintiff filed general replications;—and issues were joined.

At the trial, several bills of exceptions were filed, setting forth evidence introduced, applying to the three last mentioned pleas, but not to that of *payment*.—The jury having found a verdict for the defendants, the plaintiff made a motion for a new trial, on the ground that such verdict was contrary to the evidence; and, his motion being overruled by the court, he filed another bill of exceptions stating also evidence applying to the same three pleas aforesaid, as *all the evidence in the cause*.

Judgment being entered for the defendants, the plaintiff appealed to this court.

The cause was argued here, on the 31st day of January 1816, by the counsel for the appellant only, no counsel appearing for the appellees, who were solemnly called, and came not.

Saturday, February 10th, 1816. Judge ROANE pronounced the court's opinion, "that all the pleas, except the plea of payment, are irrelevant to the claim set out in the declaration, the appellees having failed to avail themselves of the condition of the bond by taking oyer thereof:—the issues taken therefore on the said pleas are immaterial:—and it appearing by the bills of exception that there was no evidence on the plea of payment, the said judgment is erroneous,—which is therefore reversed. And it is ordered that the verdict, and the special pleas and proceedings thereon be set aside, and the cause remanded to the said Superior Court of law, to be further proceeded on in the plea of payment, with leave to the appellees to take Oyer of the condition of the bond and plead *de novo*."

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January 31st, 1817, the counsel for the appellees moved the court to reinstate the cause, and permit him to be heard on behalf of his clients, on the grounds, that he had been regularly engaged as counsel for the appellees before the argument of the cause; that his name stands regularly entered on one of the dockets of the court, in the hand writing of the deputy clerk; that, in making out the argument docket of that session for the court, the clerk had omitted to mark his appearance for his clients on that docket; and hence, on the calling of the cause, the appellees appeared to the court to be unsupported by counsel; that, at the time when the cause was called, as well as when it was decided, the counsel for the appellees was absent at Washington, under the sanction of the court, being engaged on public business of importance to the commonwealth; and that, from these accidents, in which neither his clients nor himself were in fault, they had lost the advantage of being heard by their counsel:—but the court, not doubting the correctness in point of fact of the grounds taken by the moving counsel, was nevertheless of opinion that the precedents had not gone so far as to justify it in granting the motion; (1) and that the establishment of such a precedent might be of dangerous consequence.—The motion was therefore overruled.

A mistake of the clerk of this court, in not entering the name of counsel on the argument docket, in consequence of which, the counsel was not heard, (being absent, with leave of the court, when the cause was called,) is not sufficient ground for re-instating the cause, after the decision has been regularly certified to the court below.

(1) See *Beasley v. Owen*, 3 H. and M. 440.

Argued, January 21st, 1813. **Lightfoot's Executors and others against Colgin and wife.**

1. A wife has not such an interest in that portion of the personal estate of her husband, to which she may be entitled in the event of his dying intestate, or leaving a will which she may renounce, as that an absolute and irrevocable, though merely voluntary, deed thereof, executed by him to his children by a former marriage, can be considered a fraud on her rights, or be set aside at her instance.

2. A deed of trust, if not revocable by the grantor, is not to be considered a will in disguise, on the grounds that nearly all his personal estate is thereby conveyed, and that he reserves to himself the possession and control of the property during his life.

UPON an appeal from a decree of the Superior Court of Chancery for the *Williamsburg* District.

The bill was filed in behalf of *Anne C.*, widow of *William Lightfoot*, deceased, (who, afterwards, during the pendency of the suit, was married to *John Colgin*,) against the executors and children of the said *Lightfoot* by his first wife, and *William Allen* their trustee, for an assignment to the complainant of her dower and distributive share of the real and personal estate of said decedent; and that certain deeds which he had executed in favour of those children, be set aside, as *fraudulent* contrivances to her prejudice; the same having been made with the design of depriving her of the rightful portion of his estate, to which she would have been entitled had he died intestate; it being alleged that, in fact, the deeds in question were nothing more than a will in disguise; the donor (as was contended) retaining to himself the complete control of the property during his life, and not relinquishing the possession of any part of it until his death. It was also charged, that by a secret understanding between the donees and him, the deeds were intended to be not absolutely binding upon him, but revocable at his pleasure; which charge, however, was denied by the defendants, as were also, generally, the other matters of equity set forth in the bill.

The plaintiff, by an amended bill, moreover charged a *parol* agreement to have been made, before the marriage, and in consideration of her consenting to it, by which the said *William Lightfoot* bound himself to make a settlement upon her, in lieu of her dower, &c.; but such agreement was denied by the answers, and not satisfactorily proved. The remaining circumstances of this case are fully stated in the opinions of the judges of this court.

The cause coming on to be heard on the bills, answers, exhibits and sundry depositions, the chancellor (TYLER) regarding the deeds "as being executed for the purpose of defrauding "the female plaintiff, then the wife of the said *William Lightfoot*, of the interest in that portion of his estate, thereby con-

"veyed, to which she would be entitled as his widow in the event of her surviving him," adjudged, ordered and decreed, that all the said deeds be set aside, so far as the interests of the said female plaintiff are thereby effected; that commissioners be appointed to assign to the plaintiffs, in right of the female plaintiff, widow of the said *William Lightfoot*, her dower of all the lands whereof he was seized, (except certain lands in which her dower had already been allotted,) and of all the slaves whereof he was possessed, at the time of his death, and of the increase of the said slaves since that time, including those conveyed by the deeds aforesaid; the lands and slaves thus allotted to be held by the plaintiffs during the life of the said female plaintiff; that the defendant *Allen*, and the children by the first marriage, render accounts of all the property to them respectively conveyed, and of the profits thereof, from the death of the said *William Lightfoot*; and that the executors render accounts of the hires and annual value of all the slaves, which have come into their possession as executors, and of their transactions generally, to be reported to the court, &c.

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From this decree the defendants appealed.

Wirt for the appellants.

Call and *Murdaugh* for the appellees.

Wednesday, February 14th, 1816, the Judges pronounced their opinions.

Judge COALTER. *William Lightfoot* of *Charles City*, in the year 1807, intermarried with the female appellee, by whom he had two children.

Having taken up, very unjustly it would seem, an unfavourable opinion of his wife, and she having also displeased him by a refusal to relinquish her dower right in some lands, conveyed to one of his sons by a former marriage, he took advice how he might dispose of the greater part of his personal estate in favour of his other children by that marriage, so as to exclude his then wife and the children by her. At the time this design was conceived and carried into effect, so far as hereafter stated, he was in very bad health, in which situation he continued to languish for about two or three months, when he died.

The plan selected for this purpose was to execute a deed of trust, which was accordingly done, to his friend and relation,

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William Allen, in substance as follows. After stating that his purpose in making said deed was to advance his sons and daughters by certain gifts in his life time, which it should not be in his power to revoke, and to relieve his mind from the care and management of some parts of his estate, he, in consideration thereof, and of the love of his said children, to wit, *William H. Lightfoot, Philip J. Lightfoot, Mary E. B. Blakey, and Anne C. Lightfoot*, and of one dollar, conveys to said *Allen*, his executors, administrators and assigns forever, all his slaves, except seventy-five, to be selected as therein after mentioned, and all his other personal estate of whatever consisting, whether of plate, specie, bullion, debts by bond, bill, note or open account contract, or otherwise, or of furniture, stocks of horses, cattle, sheep, hogs, or other things, upon the following trusts, conditions and exceptions, and to and upon no other:

1st. To suffer the said *Lightfoot* to hold and enjoy the said slaves and other personal estate, or such part thereof as he may choose, during his natural life, and if he shall think proper to part with any of said stock, he shall be at liberty to do so, and shall account with said *Allen* for any money arising from the sale thereof:

2d. To reserve out of the personal estate, so conveyed, so much as shall be necessary for the discharge and satisfaction of all his said *Lightfoot's* just debts:

3d. To reserve, also, out of said personal estate, so much as shall be sufficient to raise the sum of six thousand pounds; three thousand whereof are to be forthwith considered as vested in and belonging to said *Mary E. B. Blakey*, and the remaining three thousand are forthwith to be considered as vested in and belonging to said *Anne C. Lightfoot*: but it shall not be the duty of the said *William Allen* to pay the same to the said *Mary E. Blakey*, her husband or the said *Anne C. Lightfoot*, during the life of said *William Lightfoot*, until, in his full, free, and uncontrollable discretion, he shall think proper so to do: and if the said *Anne C. Lightfoot* shall depart this life before marriage, then the said three thousand pounds shall be divided equally among the surviving children of said *Lightfoot* by his first wife:

4th. To select the seventy-five slaves, reserved as aforesaid, in such manner as said *William Lightfoot* may prefer, and, if he makes no such preference, in such manner as said *Allen* shall

choose, due regard being had to the proportionate qualities and values of all the slaves.

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5th. To transfer and assign, and in the fullest manner convey, to said *William H. Lightfoot*, *whenever, according to the true intent and meaning of these presents, he may lawfully demand the same*, a full moiety of said slaves, and other personal estate, as may belong to him, after the deductions, reservations and conditions aforesaid, and upon an equal division of the remaining parts between the said *William H. Lightfoot* and *Philip J. Lightfoot*.

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6th In like manner to transfer, &c. to *Philip J. Lightfoot*, *whenever he shall be capable in law of receiving the same*, or to his guardian, *whenever, according to the true intent and meaning of these presents, he may lawfully demand the same*, a full moiety of said slaves, &c. : but if the said *Philip* shall die before the age of twenty-one, without leaving, at his death, any child or children lawfully begotten, then his moiety, upon the division aforesaid, shall be equally divided among the surviving children by the first marriage.

7th. The grantor excepts out of the operation of said deed such property, as he had heretofore given to his children, and then concludes, that said *Wm. Allen* shall not be liable, in any manner, to any loss, damage, or expence in the execution of the trust, and that his accounts, divisions, selections of slaves, reservations, and actings shall stand firm and valid, without any CHARGE OF NEGLECT, &c.

This deed bears date on the 21st, of April, 1809. There are the names of three subscribing witnesses to it; it was recorded, however, in Charles' city court on the 19th of May, 1809, on the proof of only two witnesses, *John William* and *James Stuart*, who stand first in the order of signing. *Stuart*, in his deposition, says it was executed and attested by him on the 17TH OF MAY, 1809; at which time said *Lightfoot* was very unwell; and that 140 of his slaves were brought to his house, valued by *Wm. Allen*, and divided between the two sons mentioned in said deed, but not removed.

A few days after THE DATE of this deed, to wit, on the 27th of April, 1809, the same *Wm. Lightfoot* made his will, wherein he says, "having executed a deed for the greater part of my "slaves and other personal estate to *Wm. Allen*, in trust, with

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"certain reservations, &c. I do hereby confirm to my several children therein named, by my first wife, and to my son in law Geo. Blakey, all the estate to them respectively thereby given, whether of slaves, money, horses, or any other thing." 2d. He gives to his wife her dower in his land, and her distributable share in the personal estate now remaining to him. 3d. To his children by her he gives \$400 each, to be paid by his sons William and Philip out of the portions of his estate devised or bequeathed to them. He gives to his daughters, each, any two negro girls they may select out of his estate. He then devises a large real estate to his son Philip, and half his remaining slaves; and to his son William all the residue of his real and personal estate, and the one half of his remaining slaves, &c.; and constitutes William Allen, John Tyler and George Blakey executors of his will, and guardians of his son Philip and daughter Anne, and gives them power to make division and partition of the said estates according to the provisions of his said will, and that no security shall be required of them as executors.

On the 18th of May, he makes a deed to his son William, for the consideration of natural affection, and a small annual hire, for a number of slaves, part of the seventy-five reserved as above; and, also, about the same time, makes deeds to his son in law Blakey and his daughter Anne, for two negro girls each, which he says he had given them by his will. On the 8th of June, he makes a codicil to his will, giving to his son Philip seventeen slaves, by name, to be of equal value to those given to William by deed, being part of the seventy-five reserved.

It appears that the personal estate of said Lightfoot exclusive of the 140 and 75 slaves above, was considerable, in household furniture, horses, stock of all kinds, &c.; of which, it seems, Allen has sold, by consent, since this suit, to the amount of \$11,385,00—that said Allen has received into his possession the iron chest and trunks of said Lightfoot, since his death containing his books of account, bonds and other evidences of credits, including loan office certificates, bank notes and cash, to the amount of upwards of 15,000*l.*:—in addition to which, there appears a credit of about 1250*l.*, on account of tobacco sold by Lightfoot, after the deed of trust, to

one *Whittle*. The whole of which property, slaves, other personal estate, credits, &c. said *Lightfoot* kept in his own possession until his death, except that perhaps the two negro girls, given to *Blakey*, were delivered to him by said *Lightfoot*, together with bonds on *Fenwick* to the amount of about 1448*l*.

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The female plaintiff brought her bill in equity against the executors, trustee, &c. for her distributive share of the slaves and other personal estate, and to have the deed of trust, and other deeds aforesaid, set aside and made void as to her, as fraudulent and illegal, and to have her dower in the lands assigned her, &c.

In her amended bill, there is a vague allegation of a marriage promise, but, not considering it either sufficiently charged in the bill, or properly proved, I put it out of the case.

The important inquiry arises out of the deed of trust above mentioned;—how far it is to operate to bar her of her distributive share of the slaves and personal estate comprehended in it; and perhaps the same inquiry ought to be extended to the subsequent deeds of gift to the children of portions of the 75 slaves;—at least so far as those gifts were not consummated by delivery. I will, however, for the present, confine myself to the deed of trust.

In support of this claim, on the part of the appellees, it is alleged that the widow's rights, under the laws of this state, are similar to those of a widow in England, under the custom of London; and that, therefore, the decisions of the British courts in cases arising under the custom, are entitled to as much respect and consideration as they usually receive here, when pronounced on cases arising under similar statutes with our own. We are referred to *Blackstone's Commentaries*, and various other books as to the nature of the widow's and orphan's rights under the custom, and to numerous decisions of the Courts of Equity, in England, setting aside deeds of this kind as fraudulent. And I believe it will not be denied that, if the cases are parallel, and those decisions entitled to weight here, this case is stronger in favour of the appellees than many in which deeds there have been set aside.

Judge *Blackstone*, in the 2d vol. of his *Commentaries*, pages 491—2 and 3, says, in substance, that the power of bequeath-

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ing personal estate is co-eval with the first rudiments of the law; but that we are not to understand this power extended originally to all a man's personal estate;—on the contrary, that *Glanville* informs us, that, by the common law, as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts, of which one went to his heirs, or lineal descendants, another to his wife, and the third at his own disposal; or if he died without a wife, he might dispose of a moiety, and the other went to his children; so, *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other:—that the shares of the wife and children were called their *reasonable* parts, and the writ *de rationabili parte benorum* was given to recover them, and which continued to be the law of the land at the time of Magna Charta:—that this, in the time of Edward III., was held to be the universal or common law, though frequently pleaded as the local custom of Berks, Devon, &c.; and that Sir Henry Finch lays it down expressly in the time of Charles I., to be the general law of the land. This law, he adds, is at present altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels, though we cannot trace when this alteration at first began. Again he says, This *ancient method* has continued in use in the province of York,—in Wales and the city of London, 'till very modern times, when, as to those places, it was changed by statute.

Agreeable to this *ancient method*, whether we consider it as being originally the common law, or merely the custom of particular places, the interest of the wife in the estate of the husband, so far as it results from the aforesaid incapacity to bequeath the whole from her, was of the *same nature* as it always has been, and now is, under the laws of this state:—indeed, at present, the *extent* of that interest in this respect is also the same, as will be seen by an inspection of our old and late statutes on the subject. I say, this I believe has always been the law here; for, although, about the 25th of Charles II., when our first statute on the subject was made, doubts existed as to the widow's rights, (probably owing to that change which Judge *Blackstone* says had taken place in England about that time, and perhaps for the want of a statute of distributions similar to that which a few years before had passed there,) yet the

legislature then interfered to do away those doubts. This act will be found in 2 *Hen. Stat. at large*. p. 303. JANUARY, 1813.

It recites that, "whereas many doubts have arisen concerning the estates of persons intestate, and of *what parte thereof* ought to appertaine to the widdow, for the clearing whereof," Lightfoot's ex-
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Colgin and wife. it is enacted, "that where persons dye intestate, the widdow shall be endowed with the third part of the reall estate during life, and the third part of the personall estate, if there be but one or two children, but if there be any number of children more, in that case the personall estate to be devided amongst the widdow and all the children share and share alike; and, in case the husband make a will, that he hath it in his power to devise more to his wife than what is above determined, but not lesse."

Again, in our stat. of 4. *Ann. ch. 23.* (3d *Hen. Stat. at large*, 373,) which is nearly a transcript of the British statute of distributions of 22d and 23d *Chas. II. ch. 10.* instead of the clause in that statute which provides that nothing herein shall extend to or prejudice the custom of London and York, there is the following clause, "provided, also, that, when any person dies testate, if he leaves one or two children, and no more, he shall not have power to dispose of more than two third parts of his estate, by will, to any other person or persons than his wife, and one third part thereof, at least, shall be given to her; and if such person shall leave more than two children, he shall not leave his wife less than a child's part, according to the number of children:—but if such person leaves no child, then the wife shall have AT LEAST one equal moiety of his estate:"—it then provides, that any will, wherein a less part is left to the wife, shall upon her petition to the court where the same is recorded, be declared null and void as to her, &c.

By the 1st of *Geo. II. ch. 2. sect. 4.* (*Virg. laws*, ed. of 1733, p. 407.) it is enacted, that, where a widow is not satisfied by the provision made for her in the will, she may renounce the same, either before the court, or by deed executed in presence of two witnesses, and may then demand and recover her dower in the slaves, and such share of the personal estate as by the above act is directed.

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Thus the law stood until 1785, when it was enacted, that a widow, dissatisfied with the provision made for her in the will, might renounce the same, in manner as above, and should then be entitled to one third of the slaves, for her life, and to the same portion of the personal estate as if her husband had died intestate, to wit, one moiety if no child, and one third if a child or children.

Here we find the same incapacity imposed on the husband, to bequeath all his personal estate from his wife, which existed in London under the custom; and whether that was originally the common law, or whether it has always been the law of this state, seems to me not material to inquire into:—suffice it to say that similar *incapacities and consequent rights* existed under the custom that exist under our law, and we are called upon to weigh and determine the relevancy of decisions, in the British courts, in cases *arising under the custom*, to the one which has arisen here *under our statute*.

(a) 2 Vern. 612.

The case of *Turner v. Jennings* (a) is relied on as being very similar to the present, and though that case is as to the orphanage part, it applies as well to that of the widow; the children, by the custom, having rights similar to those of the widow. In that case the freeman, by deed executed in his life time, grants and assigns the greater part of his personal estate, in trust for himself, for life, and then for the benefit of his grand children, his son dying in his life time. The plaintiff, who married the freeman's daughter, brought his bill to set aside the deed, and to have his wife's orphanage part, according to the custom: and though it was admitted, that if the father had made an actual gift of any part of his personal estate to his grand children, in his life time, or had actually given all to one child, that would have held good against the custom; or if he had turned all his personal estate into a purchase of lands, he might have disposed of it as he thought fit; yet it was decreed for the plaintiff, and the deed set aside; for that the freeman had not *entirely dismissed himself of the estate in his life time*; and the deed being made *when he was languishing, and but a little before his death*, it ought to be looked upon as a *donatio causa mortis*: the lord chancellor declaring that either the custom must be entirely given up, or this deed must be looked upon as made in fraud of the custom.

In *Hall v. Hall* (a) the Court say, if goods are absolutely given away by a freeman in his life time, this will stand good against the custom ; but if he has it in his power, as by keeping the deeds, &c. or if he retains the possession of the goods, or any part of them, this will be a fraud upon the custom. JANUARY, 1813.
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In *Smith v. Fellows*, (b) the deed for a term of 99 years was made in trust to permit the grantor to take the rents and profits, during his life, then to assign the residue to his son, if of age, &c.—and if he should die before the grantor, to be a trust to the other children, &c. in exclusion of the widow, &c. A bill by the widow to set aside this deed was sustained. The cases of *Turner v. Jennings*, and *Hall v. Hall* were principally relied on. (a) 2 Vern. 277.
(b) 2 Atk. 62.

In 1742 this decree is confirmed by the Lord Chancellor, (c) who declares it to be a plain fraud upon the custom. (c) Ibid. 377.

In *Thompkins v. Ladbroke*, (d) a freeman of London, on the same day, executed a deed and a will ; by the former of which, he assigns 5,000*l.*, part of his personal estate, to trustees, to the separate use of his daughter, who had married without his consent, but with whom, and also with her husband, he had been reconciled ; but part of the trust of this deed was, that she should not have power to give it to her husband. (d) 2 Ves. 591.

The father was indisposed at the time he made this gift, and died shortly after. The husband, in the life time of his wife, brought a bill to set aside this assignment. The first question which arose was, whether the husband, for his own benefit, had a right to call in question an act done by the father to defeat the custom, or whether that is confined to the child. ?

The second was whether this act was in fraud of the custom.

The Lord Chancellor decided both these points in the affirmative. To establish the first position, he speaks of the orphanage rights of the child, in the life time of the father, as INCHOATE RIGHTS to which her husband became entitled. That his rights were consequential, arising from the custom, contingent at first, but vested in him, in right of his wife, after the father's death. Again, he says, "The very custom supposes that this inchoate right (if I may so call it) of the child of a freeman, is a ground of advancement of marriage, &c."

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In establishing the second point, to wit, that this was a fraud on the custom, he considers it as an act done by the father on his death bed, *and no evidence of enjoyment or possession under it in the daughter*, and therefore more in the nature of a testamentary act, and so void under the custom; and that in such cases there ought to be the *clearest evidence of enjoyment* under the grant; for this being not more than a third part of his estate, had she insisted on having the interest, during his life, he might have *threatened to dispose of the testamentary part to her prejudice*. In fact his opinion was that she would not be entitled to the interest during his life, it being a *mere voluntary assignment of an equity, and passed no legal estate*, and that the court would not decree it for her, if resisted, being *merely voluntary, and nudum pactum*; and though there was no reservation of the use of this property to the grantor during his life, yet that is inferred to be his intention from the circumstance of his not delivering the securities, (from which, as I understand, the monies were to be received during his life;) and in this respect it was likened by the judge to the case of *Hall v. Hall*. But in the case before us, we are not left to *infer* the intention to keep possession of *slaves, securities, and every thing, during his life*, for it is expressly so stipulated in the deed.

But it is said the wife is not a creditor, and has no rights against which a fraud can be committed. Might not the same, with equal propriety, be said of a husband before marriage? His right to his intended wife's property is only contingent and inchoate, depending on the subsequent marriage, which may never take place; yet a *fraud* it is said may be committed

(a) 1 Fosh. ch.
4. sect. 11.

against that right. (a) The property of the wife, nay even her contingent orphanage rights, under the custom, is a cause of *advancement* of, and consequently *inducement* to marriage, and why not the property of the husband? The husband may yield these his rights by a contract before marriage, and so also may the wife, by receiving a jointure: they are a subject of contract: so a child of a free man may compound or release to the father the orphanage part for a proper consideration, and

(f) 1 Atk. 63.
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will be bound in equity by such contract. (f) The nature of these rights appears to me therefore to be very similar; as to those of the husband, they are recognized by our courts as an

interest against which a fraud may be committed; and as to those of the wife and children, if the common law was originally what judge Blackstone says it was, and had so remained 'till this day, the decisions under the custom above referred to, and others, fully satisfy me that they too would have been recognized as rights against which fraud could be committed.

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I do not think it material whether what is now called the custom was originally the common law, or not. It was a law of a considerable portion of the kingdom, and the reasons which induced a particular course of decision under it would have applied with the same force had it been and remained the general law. But take it as merely the law of part of the kingdom, and that, almost at the dawn of our existence, it was borrowed therefrom, by our legislature, as far as it respected the wife, and adopted as the general law of this state, the rules and principles of decision, under the custom, if sound and correct equity, ought to be the same under our law; unless I am incorrect as to the parity of the cases, or unless that which is equity, under the same circumstances, at one place, is not so at another. It may be said though, that *this course of decision* forms a part of the custom, and that our law has not adopted every part of the custom, much less these decisions. I do not think it material to investigate the details of the custom, and to compare them with our law, as it is enough for me that *the decisions* above referred to are not certificates of recorders, but the application, by learned judges, of principles of equity to the rights of parties arising under a law, which, though not general, is obligatory where it is the law; and which course of decision, it appears to me, as it did to them, was necessary to prevent that law becoming a dead letter. The recorder, if necessary, certifies the law from which the right springs, as, in this case, the incapacity of the freeman, according to the custom, to bequeath the whole of his personal property from his wife, as is also declared by our law; from which leading and primary feature in the custom, and positive provision in our law, the rights of the wife in both cases arise; and to prevent the evasion of which law, and the prostration of which rights, the courts interfere:—and, although the custom may, in some of its minute details, differ from our statute, I consider that circumstance cannot impair the applicability of those decisions to cases arising under our law, unless it appears that those decisions are

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bottomed, in part at least, on such variant details. This, however, I believe, cannot be shewn, but that, on the contrary, those decisions relied on, as applicable to the present case, are bottomed on the aforesaid incapacity of bequeathing, and which, it is manifest, is common to both countries.

But suppose, since the abolition of the custom of London, by the statute of II. Geo. 2. ch. 18., a freeman, as he is authorized to do by that statute, by marriage articles agrees with his wife, that, if he dies first, she should take that share of his estate to which she would be entitled according to the ancient custom of London; what other rights would she have, under this agreement, than a wife formerly had under the custom? none as I apprehend; it being merely provided by the legislature that those who wish still to be governed by this

(a) See this statute in 2 Eq. cases abr. 278.

custom may by contract retain it, as the law of their case. (a) The wife, however, acquires no other or farther rights than she would have had, if the custom had remained the law of the land; yet here is a contract which we would all admit

(b) See a case under a contract of this kind, *Lucas v. Lucas*, 1 Atk. 270.

ought not to be evaded by any shift or contrivance; (b) the husband in this case, it is true, has a right to throw away his property, to give it away, &c.—but he cannot bequeath the whole of it from his wife; he has made a contract not to do so; and he is not, by shift and fraudulent device, to evade his solemn contract. This contract, however, if I am correct, is only equal to the law,—gives no greater or other rights: and therefore the courts could not interpose, to prevent an evasion of it, on principles which would not equally apply to a case arising under the custom or law. But it is contended that, by our law, the husband may dispose of his property from his wife in any way, except by will; and that if it is not a testamentary act, all is safe. Suppose he conveys his personal estate to trustees to suffer him to keep possession and enjoy for his life; afterwards, to such uses as he by his will should declare; and, in default thereof, to A. B. and C., his children, &c. in exclusion of his wife:—he may finally bequeath it to her or to strangers, but he dies without a will. He enjoys the property for life, has at his death the power to bequeath, which he omits to exercise, and so the case is left; his neighbour makes a like disposition of his property by deed, but makes a will and appoints the same children, who

were mentioned in the deed, to take the use, after his death. Each of these men leave a widow. For what good reason will the widow of the second receive a third of her husband's personal estate, when that of the first gets nothing? I cannot perceive any reason which is satisfactory to me for such diversity; nor would it take place, I apprehend, in England, if both cases were decided there, under the custom, as I think will be manifest from the case of *Turner and wife v. Jennings, &c.* 2. Vern. 685, & Fenb. Bk. 1. ch. 4. § 16. It is true the letter of our statute is not violated in the first case above supposed; but if the wife, by that device, should be deprived of her thirds, the statute would be little more than a letter.—That the case before us is more complex, guarded, and intricate than that put, may be very true; but, I believe, on a fair examination, and which I will endeavour hereafter to give, it will not be found to be essentially variant or stronger. So, in case of a donation *mortis causa*. This is not a testament, yet it is so much in the nature of one that it will not deprive the widow of her share, under the custom, according to British decisions.

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(a) Would it deprive her of her thirds under our law? It is, however, a disposition of the estate otherwise than by will; and if that is the only criterion to go by, it would. Upon the whole, when I reflect that our legislature, at a very early day, limited the power of bequeathing, as above stated, borrowing the idea from what was then the custom; when they afterwards borrowed the statute of distributions from that of England; and, in the place where that statute reserves the custom, &c., they introduce the same principle, so far as it respects the wife; at which time, I must presume, they were well acquainted with the decisions of the courts on the principle so engrafted into the statute, and were willing to abide thereby; I think it will be safer to be governed by these principles, so repeatedly acknowledged and acted upon, than to leave the parties at liberty to devise shifts and contrivances to violate the spirit of the law, thereby reducing it to a dead letter.

(a) Fenb. Bk. 1.
ch. 4 § 16. n. p.

It is argued, however, that to apply the decisions under the custom to our law would render wives independent, and encourage rebellion, desertion, &c.—on this very ground I should regret an alteration in the law, so as to give a complete testamentary power, as in England. A resort to marriage settle-

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*ments is the consequence there, and soon would be here. By this means, the wife is rendered more independent there, than she was under the custom : she can make the house and bed of her husband as uncomfortable as she pleases, and loses nothing by it : whereas, if he could, by absolute gifts to his children, or by seeking abroad those comforts he is denied at home, leave her penniless at his death, she might find it her interest to conduct herself better : as, therefore, I would deprecate an alteration of the law, in this respect, so would I any course of decision that may tend to render it nugatory, as resulting in the same consequences.—It has also been argued that no decision of this kind has taken place, in this country, except the case of *Cooper v. Brown*, decided by the late Chancellor WYTHE, who applied these doctrines to a case which I think was not as strong as the present ; and this silence is taken as a proof that our courts do not consider these principles as applicable to our law.—I should rather take it as a proof that the case above referred to, which was not appealed from, and the present, are probably the only cases of a flagrant attempt of this kind ; but if they are not, they are the only cases brought before the courts ; and because principles of equity have not been acted on, we are not to conclude that they do not exist.—The question whether they do exist, as applicable to our law, is now for the first time to be decided by this court ; the importance of which question I hope will be some apology for the extensive view I am endeavouring to take of the subject.*

The donor, in this case, although he *professes* in his deed to *make an advancement to his children in his life time*, in reality intended no such thing : some of them were minors, and incapable of taking care of such property, and he retains to himself the fastest hold of every thing during his life.—None of the trusts were to take effect, in possession, until after his death. He retained a right to sell a large stock, to raise money from any of the property to pay his daughters portions, as also all his debts, as well those then contracted, I presume, as any he might thereafter contract. Who was to prevent his buying lands, or other property, and paying the debts, thus contracted, out of this fund ? Nay, what was to prevent a sale of every thing ? The deed is voluntary ; is a deed of trust, and

recorded on the evidence of two witnesses only : purchasers without notice would be protected, but if they had notice, how could they judge when enough was sold for the above purposes ? Here are no scheduled debts ? Even if a court of equity would interfere, on application, to prevent this, yet if no application is made, the trustee is to be brought into no trouble for neglect.

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As to the stock though, he is to account for sales;—but when ? He has the whole during life ; and out of what funds is it to be paid, if the whole, together with the property retained, was squandered, given away, or vested in lands for his children unprovided for ? The whole of his extensive credits, public stock, &c. with the deeds and evidences of them, not only remained in his possession during his life ; but, I apprehend, the legal right to assign or recover them, and grant acquittances also remained in him, and that payments to him, or transfers and assignments of them by him, would have been good. Had they been also collected and squandered, or laid out in lands, as above, would a court of equity have decreed the latter to the present *cestui que trust* ?

With respect to the two minors, the deed LIMITS over the money to be raised and the proceeds of these credits, &c., as though he had been making a will :—payment of debts, &c. are provided for as in a will ; in fine, he being in very low health, if a will could have effected what was intended by this deed, no doubt can remain but that course would have been resorted to ; and I therefore think this deed, under all the circumstances, has been well termed *a will in disguise*.

His opinion that he had, in fact, the power to make it so, and to prevent any interference with his conduct, as to this property, in case of recovering his health, by means of the vast real property which was not settled with the slaves to work it, as it would have been had a *real advancement been intended*, but which he retains the power to deprive his sons of, in case of improper interference, is manifest from his declarations to this effect to his friend and confidant the defendant *Tyler* as proved by the witness *Bullock*. He says, in substance, that, being in company with governor *Tyler*, he said that he had written the will of *Lightfoot*, at his request ; that, previous to that, *Lightfoot* had inquired of him whether he could not dispose of his

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slaves so as to prevent his wife from her dower in them after his death: that he told him if he did really give them away in his life, without having any claim to them afterwards, in *any way whatever*, that it would prevent her from dower, and asked said *Lightfoot* what he would do, in case he should live for any length of time, or recover from his indisposition; he said he would always have landed property sufficient to make his children, to whom he was about to give or had given his slaves, dependant on him, or words to that effect.

Nay, had the whole or the greater part of this large personal estate been bequeathed to his wife, and his children unprovided for, and the land devised to the sons, on condition that this bequest should not be disturbed under the deed, or if it was, that the legatees should then have the land, I believe such bequest would not have been disturbed. And as a practical example of what he himself, and even the defendants, thought of the business, during the very short time he did live, I will instance the gift of his wife's jewels to his daughter, the power to do which is insisted on in the answer; and the sale of tobacco, to a large amount, to a Mr. *Conway Whittle*, soon after the date of the deed. In fact he had it in his power to dispose of this property as he pleased, and to make it the interest of the *cestui que trusts* to submit.

If I am wrong though, in this main question, there is nevertheless one portion of the property comprised in this deed, to wit, the credits, public stock, &c. which perhaps ought to be considered with reference to another principle. As this point, however, was not noticed in the argument, I advance to it with considerable diffidence: but if the legal title in these subjects remained in *Lightfoot*; if he alone could have sued to recover the debts, and had a right to collect and grant acquittances therefor, and to transfer the stock; and if this right and title devolves on his executors, then the trustee and *cestui que trusts* must claim through them in consequence of an alleged equitable right arising under the deed of trust. So far as this deed vests the legal estate in the trustee, the appellees cannot be said to claim through the executors, who would not take that fund even for payment of debts; but they claim to set aside that deed, merely as to them, in the same manner as a creditor would claim to set it aside, as being a fraud on the rights of the

wife, secured to her by the statute. In every other respect, it is admitted that the deed, so far as it conveys the legal title to the property, stands good : But as to the fund now in question, to wit, the credits, &c., it goes, as I apprehend, to the executors in the first instance, and is assets in their hands, and the parties must claim through them according to the nature and validity of their respective rights. A suit is instituted by the appellees to set aside the deed, as above, and also to have their distributive share of the assets in the hands of the executors.

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The distribution, according to law, of a large portion of these assets, however, is controverted by the trustee and *cestui que trusts*, on the ground of an equitable claim thereto under this defective conveyance ; and the question is, whether a court of equity will help such conveyance in favour of mere volunteers otherwise amply provided for, to the prejudice of the legal rights of the widow, who, by this deed, if I am wrong in the preceding opinion, has been deprived of her reasonable share in the other personal estate, and left with two young children to support and educate, who are entirely dependent on her.

I am not at present satisfied that the appellants stand on higher ground, as to this matter, than they would have stood as plaintiff's in the cause ; on the contrary I incline to think that the executors must be considered as stake holders, as to this subject, and the other party to interpleaders, or as the wife and distributees would have stood had not this deed been interposed ; and that, as in cases of suit for partition, in which all parties are considered as plaintiff's, each would be preferred or postponed according to the merits of his claim, without considering whether he was plaintiff or defendant in the suit, and, at most, only permitting the law to prevail, when the scales were perfectly equal as to the equity. Neither I apprehend are to be considered in possession ; for, though the trustee is also executor, he never qualified, and there are other executors who did qualify ; nor do I perceive any evidence of a transfer of this subject to him as trustee. In fact the credits may not yet be collected. Considering this fund then in the hands of the executor as such, and considering also that, as to the appellees, the will has no operation, the law of distributions must then prevail in their favour, unless there

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is some conveyance founded on sufficient consideration to intercept it and turn it out of the course prescribed by law. Now, if a will, which so far vests the legal title in the legatee that a bare assent of the executor renders it complete and effectual, would not carry this property from the wife, according to our law, to the legatee who is a volunteer, shall the same legatee take the same property by a defective voluntary conveyance, not vesting in him, (*but for the purpose of postponing the wife, in defiance and violation of the law*) as good a title as he claims under the will? For, suppose the wife had died before the husband in this case, so that it would not have been necessary to set up this deed to defeat her claim, the parties would have taken immediately as legatees under the will, and not as *cestui que trusts*, under the deed; for, claiming under that, without the aid of the will, they would probably have been compelled to yield to the superior equity of the unprovided for children, as herein after stated. If the wife's title under the law, though, is superior to the will, and cannot be defeated by it, and if the title under the deed is, in law and for every purpose, *except for the bare purpose of defeating the wife*, inferior to that under the will, how can it be set up as superior to her title under the law?

But to test this more fully by general and well established principles of equity; let us suppose that *Lightfoot* himself was in being, that he was reconciled to his wife and satisfied of the injustice he had attempted, towards her and his children by her, in this deed; and, to repair it as far as possible, was about to collect these credits with a view to make some provision for her and them; would a court of equity, in a suit brought by the trustee to prevent this, interpose to help this voluntary conveyance?

The general doctrine, as I at present understand it, is this, that where a deed is not sufficient in truth to pass the estate out of the hands of the conveyor, but the party must come into equity, the court has never yet executed a voluntary agreement.—To do so would be to make him who does not sufficiently convey, and his executors after his death, trustees for the person to whom he has so defectively conveyed: and there is no case where a court of equity has ever done that: whenever you come into equity to raise an interest by way of

trust, you must have a valuable, or at least a meritorious consideration :—nothing less will do :—and there must not only be a consideration as a motive for relief, but it must be a stronger consideration than there is on the other side.

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It is true that this is a provision for children, which generally is esteemed a consideration sufficiently meritorious ; but then this may be done away, if there is something equally meritorious on the other side, as when the heir is not provided for, &c.—But, in this case, suppose there was no will ; and that, this fund being in the hands of the executors, it was a question with the court, whether the defect in the conveyance should be supplied, in favour of the children by the first marriage, having a large provision made for them in so far as the legal estate vested in the trustee, to the total exclusion of those by the second ; would the court not find sufficient reasons for withholding their aid ? No particular child here is heir at law, but all succeed equally ; and so, according to our jurisprudence, the father is as much bound to provide for one as another. He attempts though, to give all to one, or a few, but fails to make a legal conveyance, and the party claiming under the deed cannot succeed without the aid of a court of equity ;—according to the principles above, that aid, I apprehend, will not be given.

If, though, there had been no will, and the unprovided for children had been before the court, and their equity had prevailed over the claimants under the deed, would not the wife also have prevailed and taken her share ? But if she and the children, unprovided for, would together have greater equity, in case the will had not barred their pretensions, how is her claim lessened, when the will is of no avail as to her ?—The children unprovided are repelled, not because the deed gives superior or even equal equity to their just claim, but because they are cut out by the will ; and the widow is to be defeated, not by the will that is of no avail as to her, but by the deed, which is not sufficient to defeat the legal claim of the children, if the will, as to them, was out of the way !!!

If it is true that the widow gets valuable dower lands, but without slaves to work them ; but these she gets, not from the justice or bounty of her husband, but because she could not be deprived of them.—Her dower right, though, in the lands,

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is vested in her by the marriage, as a purchaser, to take effect in possession on the death of the husband, unless she aliens in the mean time, and cannot fairly perhaps be considered as a provision by her husband.—I doubt therefore whether this ought to have any weight, especially when we consider that the law does not vary the widow's claim in the personal estate according to the magnitude of her dower in the lands, and when we farther consider that the law will not permit her rights in the personalty to be defeated by a will, and therefore I presume the courts ought not to permit a defective deed not conveying as good a title, any more than a will, to defeat her. A wife in England, even now, when every thing can be bequeathed from her, is spoken of as standing in the next rank to creditors; and our law, if it does not place her on higher ground, surely does not detract from her pretensions.—But may not demerit or great hardship as to the object and intention of the voluntary conveyance also reduce it below the level of the claim on the other side? If so, can there be a stronger case than the present, where it clearly appears that the whole and sole object of this deed was by shift and device to evade the statute, and to defeat the wife's claim under it?

But if the consideration of the magnitude of the wife's dower, in the real estate, could so far avail in this case as that the court could decree to her, upon terms that she should make a settlement upon her children unprovided for, even this would measurably effect the justice of the case.

This subject would have claimed a more full and satisfactory investigation on my part, were it not that, on the great question, as it regards the whole property comprised in this deed, I am, for the reasons above assigned, for affirming, in principle, the decree of the chancellor.

Judge Brooks. The original bill filed in this cause charges that *William Lightfoot*, the former husband of *Anne C. Colgin*, one of the appellees, combining with his children by his first wife, and others, to defraud the said *Anne C. Colgin* of her dower and due proportion of his personal estate, and to disinherit her children, executed on the 21st of April, 1809, a deed to *William Allen* for all his personal estate, except seventy-five slaves, upon trust, for the benefit of his children by his first

wife; and that, of the seventy-five slaves, a portion was, afterwards, in the month of May, fraudulently conveyed, for the same purposes, to *William H. Lightfoot, George Blakey and wife, and Anne C. Lightfoot*, all of which conveyances are prayed to be set aside, for the causes assigned. The amended bill states that there was a marriage contract, by which the appellee *Anne C. Colgin* was to have not less than fifty or sixty thousand pounds, and prays to be relieved against the operation of the deeds on that contract, and to have a specific execution of it.

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Putting out of the case the pretended marriage contract, which is not supported by any adequate proof, and admitting (what I think seems established by the evidence,) that the deeds were executed with the intention to defeat the claims of the wife to that portion of the estate to which she would have been entitled in the event that her husband had died intestate, or leaving a will which she might renounce; the inquiry is, whether the wife has such an interest in the personal estate of the husband during the coverture, that a fraud has been committed upon it by the operation of the deeds in question. In making this inquiry, I shall endeavour to place the subject in the two distinct views that were taken of it by the counsel for the appellees. The first position is, that the deeds are fraudulent because they defeat the rights of the wife under our statute; the second, because the deed of trust to *Allen* is not absolute and unconditional but testamentary in its operation.

The correctness of the first position must depend on a sound construction of the statute of 1785, in connexion with the preceding acts of 1727, 1705, and 1672, by which the interest of the wife in the personal estate of the husband is recognized and ascertained. The act of 1785, (which was re-enacted in 1792,) 25th section, declares that, when a widow shall not be satisfied with the provision made for her by her husband's will, she may, within one year from the time of his death, in the manner therein prescribed, renounce all benefit which she might claim by the same will; and thereupon such widow shall be entitled to one third part of the slaves whereof her husband died possessed, which she shall hold during her life, and moreover be entitled to such share of his personal estate as if he had died intestate. In considering that act, I have been unable to dis-

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cover any thing that can affect the absolute and exclusive interest of the husband in the personal estate during the coverture :—its whole operation on this branch of the subject is evidently confined to a limitation of the power of the husband to dispose of more of the personal estate by *will*, than is therein prescribed, and only giving to the wife an interest in the personal estate after his death, and not before. This exposition is in perfect correspondence too with the preceding acts; the first of which, and the earliest that I have been able to find, the act of 1672, for the purpose of settling some doubts as to the rights of the wife, (whether to dower in the lands of her husband, or to a portion of his personal estate, does not sufficiently appear,) for the first time negatives the power of the husband to dispose of more than two thirds of his personal estate by will; which negative is handed down to us, through the other acts, until we come to the act just recited. But it is argued that this exposition of the rights of the husband does not comport with the rule of the common law, which is supposed to have been adopted by the acts referred to, and which rule is best understood by a reference to the decisions on the custom of London, which it is contended is nothing more than the old common law, by which the rights of the wife are protected against the operation of the deeds in question. What the common law was in England, before the several acts on that subject were enacted here, appears not to be very clear. The rule, that the wife was entitled to a reasonable part of her husband's personal estate in case of intestacy, has not been doubted; but that she was entitled also to a like proportion in opposition to his will, is not satisfactorily deducible from the general law; and, if it were, I think I shall be able to shew that no fair inference from the rule itself would affect the present question. *Blackstone*, (the authority most relied on as to this point,) after deducing, in his 2d vol. p. 490, from Noah down to Jacob, the power of the husband to bequeath the whole of the personal estate, says, in p. 491, "with us in England, this power of bequeathing is coeval with the first rudiments of the common law; for we have no traces or memorials of any time when "it did not exist," &c.—Taking this passage in connexion with what had been said before, and the inference would be conclusive that this power of bequeathing which he speaks of

extended to the whole of the personal estate in exclusion of the rights of the wife, which is lord *Coke's* doctrine in 2d Institute, p. 33, and *Swinburne's* also, whose authority in this country has never been questioned, that I know of.—But *Blackstone*, in p. 493, qualifying what he had before said, says, “we are not to “imagine that this power extended to the whole of the personal “estate of the husband,”—denies the law as laid down by *Coke*, and says, he took the exception for the general rule, and quotes *Bracton*, (from whom lord *Coke* in some measure got the law,) and *Glanville* and *Fleta*, to prove the correctness of his criticism. Without meaning to settle this controversy as to what the law was in England, which I think will be found to have no influence upon the decision of the case now under consideration, I shall make but a very few observations on it. If the right of the wife to the writ *de rationabili parte bonorum*, in opposition to the will of her husband, was founded on general law, it seems extraordinary that it should have been often pleaded, (as is said by *Blackstone*, p. 492,) as the local custom of Berks, Devon, York, &c.; because we are informed by the same author, p. 262, that custom is a local usage, as distinguished from prescription which is personal, both of which are exceptions to the rule of the common law; and it is equally remarkable that the statutes, to which he refers, as intended, as he says, to reduce the whole kingdom to the same standard, were evidently intended to abolish the customs of particular places, wherein the rights of the wife now contended for, were acknowledged. The circumstances strongly favour the position of lord *Coke* and *Swinburne*, that this right of the wife was founded on custom, and was no part of the common law. That there was great diversity of opinion, in the old books, on this point, is stated by lord *Coke* himself, and he adopted what he supposed the better opinion:—that this diversity prevailed long after is probable;—but I have been unable to find any decision controverting the opinion of lord *Coke*; and, as late as the year 1737, lord *Hardwicke* in the case of *Heron v. Heron*, (a) seems to con- (a) 2 Atk. 169. cur with lord *Coke*.—Indeed, if the rights of the orphan under the custom of London are founded upon the writ *de rationabili parte*, (as *Blackstone* says it is,) lord *Hardwicke*, in the case referred to, expressly declares that the father according to the

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general law, had full power to disinherit his children, but was restrained by the custom.—Much more might be said on this subject:—The incongruity in that which is custom, being a part of the general law, to which its definition imports it to be an exception, might be remarked upon;—but leaving it to the antiquarian (to whom it more properly belongs,) to settle the controversy between lord *Coke* and *Blackstone*, I shall proceed to consider the question in reference to our own acts, whatever may have been the rule in England.—Our first inquiry, when expounding our own statutes is, what was the understanding of the legislature, as to the rule here, when these statutes were enacted.—The act of 1662 is the earliest. At that time, *Blackstone* had not given to the world his learned Commentaries:—His elucidation of the point now relied on, was not known to the legislature of Virginia:—*Coke* upon *Littleton*, and the Institutes were the oracles of the laws in this country;—they were the text books of the lawyers and legislators of that day; and the phraseology of the act last mentioned, and the successive one on the same subject, confirm the idea, that the law as laid down by lord *Coke* was in the mind of the legislature, when the act of 1662, and the act of 1705 passed.—This second act on the same subject, and which follows up the act of 1662, declares that, when any person dies testate, if he leaves one or two, and no more children, he shall not have power to dispose of more than two thirds of his estate by will to any other person or persons than his wife, &c.—These expressions leave no doubt in my mind that they were intended to restrain the husband in the exercise of a pre-existing right to dispose of his whole estate by will. The language of the legislature used in this passage, indicates, too strongly to be questioned, the intention to alter the then existing law, and intimates, as plainly as it could do, what the law was which was intended to be altered.—The act of 1727, gives no additional light on this part of the subject:—it limits the right of the wife to renounce the will of her husband to the period of nine months.—The act of 1785, which was re-enacted in 1792, extends the time to twelve months, and, after prescribing the manner in which the wife is to renounce the will of her husband, declares that, thereupon she shall be entitled to one third of his slaves, of which he died possessed, which she shall hold during her life, and to such

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share of his personal estate, as if he had died intestate. By referring to the case of intestacy by which to fix and explain the degree of her claim, it excludes, as forcibly as possible, the idea of her having a more exalted right to the personal estate, during the coverture, than any other distributee, and places their claims upon the same foundation.—Her renunciation of the will gives her no higher pretensions than if her husband had died intestate:—in one case she claims through the executor;—in the other, through the administrator.—Acts which he himself could not avoid in his life time, cannot be avoided, I presume, by those who must claim in his right, and merely as his representative.—If he had devised the property in question, it would not have passed by the will; and her renunciation of the will would not better her case, because, under the act, she must take as if he had died intestate; and it follows, by a necessary consequence, that he could not, by operation of the act, under any consistent construction of it, be made to die intestate as to property which he could not devise.—This view of the subject would seem to exclude the necessity of saying any thing of the cases decided on the custom of London; but, as they have been much relied on in the argument, I shall take a brief view of them.—Admitting that the custom is a part of the common law, as has been contended, and not an exception to it, as all customs are said by *Blackstone* to be, and that our acts of assembly have adopted or re-enacted the common law, these decisions upon the custom will be found, on examination, to be very unsafe expounders of those acts.—They contain principles entirely novel in this country, and by no new construction, however tortured, to be extracted from the acts themselves, or, in my opinion, from the naked rule of the supposed common law itself.—In the case of *Fairbeard v. Bowen*, (a) it was decided that a voluntary judgment confessed by a freeman of London shall not prevail against a simple contract creditor, or against the widow, but she must have her share according to the custom:—and, in a note to that case several cases are referred to, to shew that the widow and orphan of a freeman are in the nature of creditors, and that any loss happening by the insolvency of the executor must be borne by the testamentary or dead man's part.—This doctrine does not result from any fair exposition of our acts of assembly,

(a) 2 Fern. 202.

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or of the supposed rule of the common law :—a bare right to a reasonable share of the husband's estate, of which he might die testate or intestate, without any restraint upon him in the use of it during the coverture, makes the wife nothing more than his representative, and could not place her in the rank of a creditor :—She has never held that rank under our law.—

The inference I draw from this is, that all the consequences which make up the doctrine relied on, (if I am to admit that the custom grew out of the common law,) must have been superinduced by the application of that rule to the peculiar situation and circumstances of the citizens of London, or by engrafting on the rule the local usages of the place. Thus, we know that the doctrine of waste, in this country, differs from the doctrine in England, though extracted from the same law.—

This inference is much strengthened by a nearer view of those customs, from whatever source they may have sprung.—*Blackstone*, (1st vol. p. 75.) says, "this custom, and many others are "contrary to the general law of the land;" and, in p. 76, he says, "the customs of London differ from all others in point of "trial;—they are tried not by jury, but by a certificate from "the lord mayor and aldermen."—For all that appears to the contrary, these decisions upon the custom may have been bottomed on some of these certificates.—If it were admitted, then, that the custom was nothing more originally than the rule of the common law, and also that our acts adopted that rule, these decisions upon the custom would be very blind guides in conducting us to the true exposition of our statutes.—The cases of

(a) 2 Vern. 612.

(b) 7 Vinor.

(c) 3 Atk. 678.

(d) 2 Vesey,
sen. 591.

Turner v. Jennings, (a) of *Edmonson v. Cox*, (b) *Coomes v. Elling and wife*, (c) *Tomkins v. Ladbroke*, (d) and a long list of others that were cited, appear to me to have no bearing on the question now to be decided, except to prove that if a freeman of London disposes of his property by an incomplete conveyance, or in such manner as not to take effect until his death, it is a fraud upon the custom. These cases, if they apply at all, have more bearing on the second point that has been made in this cause.—As to the doctrine that an incomplete conveyance would be a fraud upon the custom,—so far as it can be made to apply to a conveyance which did not divest the grantor of the property, so as to prevent his dying intestate in relation to it, or disposing of it by will, I presume in such case a conveyance

of that description would not defeat the right of the wife under our law.—But the deeds in this case, in my opinion are not exposed to that objection.—As to the interest intended to be passed by them, and which is the subject of this controversy, I see nothing, in the deeds, which left to the grantor any control over that interest incompatible with the grants after the execution of them. The reservation of a life estate in some of the property conveyed will be noticed in the examination of the second position.

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That position is, that the deed of trust sought to be set aside, is not absolute, but a mere testamentary act revocable by the grantor.—I shall leave out of the examination of this point the suggestion that it was to have been re-delivered to the grantor in the event of his recovery from the sickness, with which he was then afflicted;—because that fact is not sufficiently proved, and, if it was, I am not satisfied that it would affect the case.

The deed is said to be only testamentary, because (as the phrase is in one of the cases upon the custom,) the grantor did not dismiss himself of the property:—but I think the answer is that he did dismiss himself of his whole interest in the reversion, which was all that was intended to pass by the deed:—it was not intended to affect his *life* interest in the property.—The essential character of a testament is that it is at all times revocable; but it will not be said that the deed in question could have been revoked by the grantor; or that the interest conveyed to the trustee would have passed by his will; or, putting the claims of the wife out of question, that it would have devolved on an administrator.—The principle, which admits that the grantor might have disposed of his whole interest in the property for the purpose of providing for his family, cannot be made to deny him the right to dispose of a part of it for the same object.—The objection that, by reserving the life estate, he had the full enjoyment of the property, and in that sense did not dismiss himself of it, is founded on the supposition that the property must be enjoyed to the full extent of the interest of the owner in it, or it would not be beneficial.—The answer to that is, that to retain the reversionary interest in property is not always the best way to enjoy it:—to deprive the husband of the power in his life time of disposing of

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any portion of his interest, especially in slave property, would limit his means of advancing his children, and give to his wife a higher claim than that even of a creditor under some circumstances;—a consequence which cannot be admitted by any fair construction of our law.

With respect to the public stock, and other credits, included in the deed of trust to *Allen*, if the children by the last marriage were complainants in this case, the question which might arise in relation to their rights thereto, would merit examination, and would be susceptible of views not now taken.

I concur therefore in the decree, which is to be entered as the decree of the court.

Judge ROANE. In deciding the question relative to the validity of the deed, I will admit the most for the appellees; and that is, that it was more the intention of the grantor, in executing it, to impair the interests his wife would have been otherwise entitled to in his estate, than to provide for his children. It is manifest, from the testimony, that this was a determination long previously formed, and never abandoned. This intention is, also, clearly betrayed by the unusual and over cautious expressions contained in the deed itself. As to these, the maxim, "*clausula inconsuetas semper inducant suspicionem*," forcibly applies. I have no hesitation in admitting that, as to creditors and purchasers, the deed would be considered fraudulent. It is not to be forgotten, however, that the grantees in it are the children of the grantor; an obligation on the father to provide for whom, is said by this court in the case of *Ward v. Webber*, 1 *Wash.* 274., to be a good consideration both in law and equity. The contest, then, is between children, who are more than volunteers, especially as they are not shewn to have been otherwise provided for, and the wife; who maugre this effort of the husband, had an ample provision of which he could not deprive her. There is no strong preponderance of claim in point of equity, therefore, on the side of the wife, when contrasted with the claim of the children. In the case of *Taylor v. Jones*, 2 *Atk.* 603, which was a contest between the wife and children on one part, and the creditors on the other, it was said by the master of the rolls, that, although he had great compassion for the wife and children, yet, if the creditors should not

receive their debts, *their* wives and children might be reduced to want. So, in the case before us, although some compassion is, perhaps, due to the wife, as much, or more, is due to the children, who, or whose wives and children, may, by setting aside the deed, be left in a measure unprovided for.—I mention this to shew, that this consideration of compassion ought not to influence us much, as it applies on both sides, and ought rather to preponderate in favour of the party otherwise unprovided for. I must also remark, that if this decision is to be influenced by considerations of a supposed inequality between the relative provisions for the parties, (the amount of which, however, is not proved in the cause.) it will form a rule in cases in which no such inequality exists: and that, if a deed clearly fraudulent under its actual circumstances is to be set aside in this case, the next effort will be to vacate one which is merely considered fraudulent by being *voluntary*. In *Russell v. Hamond*, 1 *Atk.* 15, it is held that the circumstance of a deed being voluntary is considered as an evidence of its being fraudulent. Where are we to draw the line between the two cases? between that of a deed impeached as fraudulent by positive acts of fraud attending its execution, and one which is only inferred to be fraudulent by being shewn to be voluntary? We are getting into a wide field; one which would set aside, in favour of the wife, a deed however fair, and however inconsiderable as to the provision it conveys to a child, if it be merely voluntary, or without a *valuable* consideration!

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Admitting this deed to be clearly fraudulent, does it not cease to be so, *quoad* the appellees, if they have no interest to entitle them to impeach it? Must there not be two parties, before a deed can be considered and set aside as fraudulent, the party defrauding, and the one defrauded?—and can the *last* exist unless he has a vested interest? It is held that, by the common law, a person having a debt due him, or a right or title to a thing, might avoid any fraudulent conveyance made to deceive or defraud him of that right or debt: (a) but it is (a) 3 *Bac.* 307, and 3 *Co. Rep.* 83. *Twine's case*. there was no way to set it aside: (b) and, again, it is held, that (b) *Ibid.* he who hath a right, title, interest, debt or demand *mere piasse*, shall not avoid a fraudulent gift or estate precedent, by the common law. (c) It is by these principles of the common law, (c) 3 *Co.* 83.

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that the case before us is to be tested ; for the statutes made in aid thereof only apply to creditors and purchasers. If the right of the wife in this case is *puisne* and *posterior* to the date of the conveyance, she cannot impeach it according to the foregoing principles of the common law ; if, on the other hand, her right be considered *precedent* thereto, it would carry with it a right to restrain the husband's power of alienation in his life time ; but the husband's power of alienation in his life time is conceded by the appellee's counsel, who only object to the deed before us as being, as they say, a *will* in disguise. If a right existed in the wife to restrain the alienations of the husband, she would be more than a volunteer ; she would, at least, take the rank of a creditor. It is admitted that, under the custom of London, (as will be presently more particularly noticed,) the wife is sometimes considered as a creditor ; but she has never been so considered in this country, and cannot take either negroes or other personal property, but in subordination to creditors, after they are satisfied, and in the mere character of a distributee. This is admitted even by Judge TUCKER (a) ; a gentleman who, in the cases of *Claiborne v. Henderson*, (b) and *Ambler v. Norton*, (c) to say nothing of his commentaries, seemed disposed to go as far in behalf of the rights of widows, as perhaps any judge who ever sat in this country. If then, the wife is not a creditor, nor to be considered in the light of a creditor, as to her husband's goods ; if she cannot restrain his disposition thereof in his life time ; where is her interest, which, under the foregoing principles of the common law, will sustain her in objecting to the alienation in question ?

As to the claim of the wife to a provision from her husband's estate after his death ;—while it is founded in justice and equity, it does not extend to the whole thereof. It is to be limited by the positive provisions of the law. This was decided in the aforesaid case of *Claiborne v. Henderson*. There is no hardship in this ; for she knew the extent of her rights, and of the husband's power over his property, when she married him. There is the less hardship in allowing the husband unlimited power of disposition over his personal property in his life time, as she gains an indefeasible interest in his real. She is therefore bound by the positive provisions of the statutes. The act which immediately relates to this subject, declares that,

(a) 2 Tuck. Bl. appx. p. 86.
(b) 3 H. & M. 340.
(c) 4 H. & M. 31.

when a widow is not satisfied with "*the provision made*" for her by her husband's will, she may renounce the same, and, **THEREUPON**, she shall be entitled to one third part of the slaves of which he *died possessed*, to be held for life, and be moreover entitled to such share of his other personal estate, as if he *had died intestate*, to hold as her absolute property : and, on recurring to the act relative to this *last* subject, it is said that, when a person shall die intestate as to his goods and chattels, or any part thereof, *after his debts shall have been paid, &c.*, one moiety, or, if there be a child or children, one third of *the surplus* shall go to the wife, and the residue shall be *distributed*, in the same proportions, and to the same persons, as lands are directed to descend in and by the act provided on that subject. The first mentioned act, in speaking of the "*provision made*" for the wife by her husband's will, seems to exclude the idea of a provision paramount and *anterior* to the will. It supposes the provision to be made by the *will*, and not by the *law*, except in the case of her renouncing the will, in which event, she is restricted to the third of the slaves of which her husband *died possessed*. It excludes the idea of an interest in the wife paramount and anterior to the will, which would afford her a foundation to stand on to impeach her husband's alienations of property in his life time. Such an interest would be deemed a provision ; and yet this act goes on the ground that no provision existed but that made by the will. The act recognizes only two classes of provisions ; that made *by the will*, and that which is to take place *on the renunciation* thereof, as is evidenced by the term "*thereupon*." It does not recognize an interest which would enable her, as it would a creditor, to set aside a voluntary or fraudulent conveyance, and which would, consequently, be in effect a provision. So, when the act says that she shall have one third of the slaves of which her husband *died possessed*, (by which I understand *entitled*.) it excludes her from those to which he was not entitled at the time of his death, in consequence of having previously conveyed them away. It is a complete recognition of his right of alienation as existing on general principles ; it is equivalent to saying that she shall not have such as he did not die *possessed* of, by having sold or granted them away in his life time. The construction of the act in this particular, is *analogous* to that on

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which this court proceeded in the case of *Templeman v. Step-
toc*, 1 *Munf* 370. In that case it was held, upon the construc-
tion of a clause of the act of descents, that the exclusion of the
mother, in case there be a brother or sister on the part of the
father, was equivalent to a declaration that the last mentioned
persons should themselves succeed. The right of the husband
to the dominion over his personal estate is absolute and com-
plete, except so far as an exception is made in favour of the
wife. That, in the case before us, extends only to such slaves
as he *died possessed of*; his power over those antecedently sold,
or given away, is admitted, as well by the principle of the de-
cision just mentioned, as by the principle that the exception
proves the rule.

If, then, the wife, as to the personal estate of her husband,
is not to be considered as a creditor; if she has no vested in-
terest therein; if there be no decisions to this effect, either in
this country, or in England, except upon the construction of the
custom of London, is it fair to apply the decisions under that
custom, in which she is sometimes held to be a creditor, and at
others to have a vested interest, to the case before us? If, un-
der that custom, she has a ground to stand on to impeach the
conveyance, can she do it here where no such interest exists? I
do not profess to understand that custom, nor the decisions
under it; but this I understand, that, by the principles of the
common law, no person can complain of a fraud who has not
an interest in the subject in question; and that a wife has
no legal interest in her husband's goods, during his life
time, that can prevent his aliening or giving the same away.
I also understand that the wife under that custom, is considered
as having an *interest* therein. I shall not stop to inquire on
what grounds (not applying in this country) this has been so de-
cided in England; but I will refer to a few of the cases in
which the interest of the wife and of the children *under the
custom*, is placed upon a footing, and has a dignity, never as-
cribed to the claim of the wife in this country.

In the case of *Tomkyns v. Ladbroke*, 2 *Vezey*, sen'r. 591.,
it was held that the interest of a child under the custom, was
an *inchoate* right, and a *ground of advancement* in marriage;
and that, although such child cannot, strictly speaking, be said
to be a creditor, yet, that that is an ANALOGOUS EXPRESSION,

when applied to such child. In the case of *Heron v. Heron*, 2 *Atk.* 167., it is said that the intent of the custom was that the children should be *advanced in marriage* thereby ; and that, on that ground, agreements respecting it are supported in equity. The same doctrine is laid down in *Kemps v. Kelsey*, *Precedents in Ch'y.* 594. So in the case of *Fairfield v. Bowers*, 1 *Vern.* 202, and 1 *Fonb.* 278., it was held that a voluntary judgment should not prevail against simple contract debts, nor against the widow of a freeman, who should have her share notwithstanding ; but that the said judgment, (his debts being paid) would bind the *legatory* part. In a note to that case it is said, that the widow and orphans under the custom are in the nature of *creditors* ; and that, in case of any loss by the insolvency of the executor, it should be borne by the *testamentary* part only. So it is held in 2 *Bac.* 256., that, if a loss happens to a freeman's estate, it is to be borne by the testamentary part only, and not out of the whole personal estate, for that his wife and children are in nature of *creditors*, and shall have two parts in three of what he died possessed of, though his legatees should be thereby defeated of their legacies. So in the case of *Read v. Duck*, *Precedents Chan.* 409., it was adjudged that, where the personal estate was rendered deficient by the defalcation of the executor, the deficiency is to be entirely borne by the *dead man's share*, as the wife and children are in the nature of *creditors* to the amount of two thirds of what he died possessed of, and that the loss is to be borne by the legatees.

These ideas are quite new in this country, as applied to the rights of the wife. She is not considered as a creditor, nor can her interest prevail against creditors of even the lowest degree. Losses, such as those just mentioned, are to be borne by the *whole* estate, all of which is a legatory part *quoad* that purpose ; and she can only come in for a part of the surplus after creditors of every class are satisfied. This is admitted even by Judge TUCKER, in the passage before mentioned, as the *established law*, although, as to negroes, it seems to be his individual opinion that, under the word "*possessed*," she would be entitled to her third in preference to creditors. In the same passage this writer has laboured to put the wife upon the footing of a *creditor* ; but he admits, at the same time, that his construction in this particular has not prevailed.

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These prominent marks of distinction between the character of the widow's claim under the custom, and under our laws, make the decisions upon the customs very unsafe and improper guides in the case before us. They are utterly inapplicable. Her right to impeach the conveyance under the custom, is bottomed upon an *interest*, not admitted to belong to her under our laws, and which would support her under the before mentioned principles of the common law. In this country she has no such interest, until after all creditors, and even *voluntary* claimants, by grant from the husband in his life time, are first satisfied. To satisfy them, the whole personal estate is to be considered as the *legatory* part in this country; which is otherwise under the custom of London as aforesaid.

But this is not all; most of the English cases on the custom only set aside such conveyances as are considered in the light of a *donatio causa mortis*, as *quasi* a will, and not such as are considered perfect grants. This is conceded by the appellee's counsel, who have contended that the conveyance before us is in fact a will in disguise. I have been able to find only one or two decisions of a different character, and they have been, perhaps, attended by circumstances not existing in this case. The case of *Comper v. Brown*, supposed by one of the judges to be a stronger case than this, in addition to its being a solitary case, by an *inferior* court also, probably went off on the idea of being a *donatio causa mortis*; for the deed and will are stated to have been made on the *same* day, and therefore as forming, as it were, one transaction. But, in the case before us, the conveyance in question has no ingredient of a testamentary act, or of a *donatio causa mortis*, when one, moved by the present peril of death, gives and delivers something to another, to be his *in case the giver die*, or, if he live, to have it again. This gift is compared to a legacy, and it becomes not his *presently*, but in case the giver die. (a) This gift is ambulatory, and open, 'till the donor's death, and may be revoked as a will may. (b) But, adds the same author, if one, just before his death, gives goods *absolutely*, this is not a *donatio causa mortis*, because it is not revocable. (c)

These criteria entirely exclude the conveyance now in question. By it the property was absolutely given by an instrument which is not revocable. The right of the donees is

not to depend upon the event of the donor's death ; nor was there any trust or confidence that the donor was to have it back in case he recovered from his illness. Indeed, the grant was not made during a last illness ; nor was it moved by a present peril of death, but was only the consummation of a purpose long before settled, as is proved by Mr. Tyler and others. It is, therefore, not a *donatio causa mortis*, or a testamentary act ; if it were, indeed, a will in disguise, as was argued by the appellee's counsel, it could not withstand the justice of this court. It would stand interdicted, as well as an open will, by the positive provisions of the statute.

Considered as a grant, it is of no importance that a remainder only is granted, while the life interest is retained. That remainder is a vested interest, is a real advancement, and may be alienated. In the case of a father having but *one* negro, he can only provide for his child, in *this* way, without depriving himself of the present use of that negro altogether, and reducing himself to want. This decides the principle of the case. Again, it is said that the donor did not part with the possession of the property. Two answers occur to this objection : 1st, That the possession of the donor is consistent with the deed of settlement which is recorded ; and 2d, That this possession cannot be objected on the part of the wife. 1st, Because she cannot be supposed to be ignorant of this open and notorious transaction done by her husband ; and 2dly, because she is not a creditor, and could not therefore be defrauded or deceived by a delusive possession. It is held in *Ryal v. Rolle*, 1 *Atk.* 197, that possession of goods is no otherwise a badge of fraud than as it is calculated to *deceive* creditors ; for, as to goods (adds the chancellor,) I have no way of coming to the knowledge of the owner, but by seeing who is in possession of them. In the case before us, that knowledge was afforded by a recurrence to the records. The separation of the possession from the right, therefore, cannot be objected by any, and much less by the wife, who is no creditor, and must also be supposed consant of all the transactions of her husband. With respect to what is said by one of the judges, of placing the children under terms in consequence of the *legal* title of some of the property being in the executors, and not in the trustees ; the answer is, that these children are not plaintiffs, and ask nothing from the court,

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but that the bill be dismissed, and the executors and trustees be permitted to fulfil their trusts: there is no ground for such decree, therefore, existing in this suit.

This view of the subject determines my opinion in the present case. Owing to the particular circumstances involved in it, I may regret the judgment I am obliged to give. I had even strong feelings, on the argument, in favour of the appellees, which had almost overpowered the best convictions of my understanding. I rejoice, however, that I am liberated from my first prejudices, and that I shall not now give a decision, which would afford a precedent in other cases, exalting the claim of the wife beyond its proper level, and abridging the heretofore admitted right of the husband over his personal property. I shall not, even in this strong case, lay the foundation of a superstructure, the consequences of which I am unable to foresee or estimate. My opinion is, that the deeds in question be decreed to be valid; and that the decree be reversed so far as it holds the contrary, and the wife be let into all her legal rights, excluding those passed by the deeds in question. I concur in the particulars of the decree to be exhibited by the president.

Judge FLEMING. This cause seems to me important, rather from the magnitude of the subject in controversy, than from any difficulty in the principles on which it should be decided; which, I conceive ought to be by the laws of our own country, without regard to the customs of any foreign country or city whatever, unless they perfectly coincide with the principles, laws, and usages of our own.

Two points only appear to me material to be considered, 1st, whether a marriage agreement, or promise, on the part of *Lightfoot*, as charged in the bill, or any other, be proved?—and 2dly, whether, if not, he had a right to dispose of his personal estate in any manner he thought proper in his own life time.

With respect to the first point, I consider the boastings of *Lightfoot*, that he was worth 180,000*L.*, mentioned in one of the depositions, a mere gasconade, or idle talk, not affecting the present question, and the only evidence of a marriage promise that appears in the record, is the deposition of *John H. Boswell*, who says that, “some few weeks before the marriage,

" he heard the said *Wm. Lightfoot* tell the said *Ann Clopton Ellison* that, if she would marry him, he would give her a " jointure of 40,000*l.* ; besides which sum, in case he died " first, she should be entitled to one third part of his personal " estate."—The latter (after debts, funeral charges, &c. paid,) the law would have given her, without any promise whatever.

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But the deposition of *Boswell*, so far as it goes to prove the promise of a jointure, is inadmissible evidence, if we pay respect to our statute of frauds and perjuries, which was intended to guard against the very evil and mischief which now appears before the court. And I consider myself as much bound by that statute as by any one in our whole code of laws ; as I can discover nothing in the record to take this case out of the operation of it. But admitting for a moment, that the promise of a jointure had been legally proved, the appellees must either give up the claim, or rely upon it altogether ; for it is a well settled principle that, by our laws a widow shall not have both jointure and dower ; though, in some cases, she has an election to take which of the two she may think most for her benefit. In regard to the second point, whether *Lightfoot* had a right to dispose of his personal estate in any manner he thought proper, during his own life time, I have no doubt ; as no marriage agreement or promise has been proved, to give his widow a lien on that part of the estate.—It is admitted that, it appears from the evidence, one motive for his conduct was to deprive his wife (with whom he had for some time lived unhappily,) of dower in a great portion of his personal estate ; but whether or not, his motives for such conduct comported with the strict rules of morality, is not for me to decide ; but it is worthy of remark, that his large gifts of personal property after his second marriage stated in the record, were not to defraud creditors but they were to advance in life his own offspring, by a former *venter*, three of whom were married and had issue ; and for whom he had, previously, made but a slight provision ; and therefore he was naturally and morally bound to provide for them ; the measure of which provision was altogether within his own breast, so far as it respected his personal estate : and should this court interfere with, and control such his undoubted right and privilege, it would, in my apprehension, be making a very injudicious and dangerous

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precedent ; and one of the worst that a court can devise, for disturbing the peace and quiet of families ; the evils of which are beyond my powers of calculation. I am therefore of opinion, that so much of the said decree of the superior court of chancery, for the district of Williamsburg, as sets aside the deed of trust of the 21st of April, and the several subsequent deeds of May 1809, as fraudulent ; and also, so much of the after part of the said decree as is consequent thereon, is erroneous, and ought to be reversed ; and the residue of the said decree affirmed. And that is the opinion of a majority of the court.

The following was pronounced as the court's opinion :—

The Court is of opinion that, although, in a controversy between *creditors* of the grantor *William Lightfoot*, in the proceedings mentioned, and the appellants his children claiming the slaves and personal estate now in controversy by voluntary conveyance from the said *William Lightfoot* their father, the said conveyances might, under the circumstances disclosed in this case, be held to be fraudulent as to them ;—yet that, in this case, of a controversy between the children of the said *William Lightfoot*, not shown to be otherwise provided for, and his *widow*, who is entitled to a large dower in his real estate, besides her share in his personal estate unconveyed by those deeds, the court has no power to set aside the said deeds ;—both because of the meritorious claims of the children, as aforesaid ; because the widow has no claim of *interest* in the property, conveyed by the deeds aforesaid, which will let her in to impeach the same ; and because there is no principle, authorizing this court to interfere in this case, which would not equally justify it in setting aside a deed, *as fraudulent*, made in favour of children otherwise unprovided for, on the ground of its being *voluntary*.—The court is farther of opinion that, although the widow of a person dying seized of real or personal estate has a legal, equitable and moral right to a provision from his estate after his death, yet that this claim does not extend to the *whole* thereof,—must be limited and defined by law as to the extent and quality thereof,—and be in subordination to the claims of creditors, and others, to whom a preference is given by the positive provisions of the statutes.

Acting under the influence of these principles, the court is of opinion, that in the case before us, when the female appellee renounced the will of her husband, she was only entitled to dower in the slaves of which her husband died possessed, and to such a part of his other personal estate as she would have been entitled to, had her husband died intestate, and is not entitled to disturb the conveyances now in question, because of her want of interest as aforesaid. In making this decision the court considers the conveyances aforesaid as absolute and irrevocable deeds, and not, as was argued, wills in disguise, which this court would not permit to elude the just claims of the wife as provided for by statute.

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The court is farther of opinion that this case cannot be at all influenced by decisions upon the custom of London, (which were so much pressed in the argument;)—among other reasons, because that custom has given to the claims of the wife and children arising under it a dignity not belonging to that of the wife, claiming independently of the will, in this country; and because, while the cases on the custom, which were cited, are, on this ground, wholly inapplicable, they are also inapplicable so far as they apply to the deeds annulled and set aside thereby in England; for those deeds had a resemblance to a testament, or, at least, to the testamentary disposition called a *donatio causa mortis*, to which the deeds now before us bear no similitude; the same being neither ambulatory and revocable, made in present peril of death, nor under a confidence that the property would be restored if the donor recovered from a present illness, but being conclusive deeds made in pursuance of a determination, long previously formed, to grant the property to his children.

The court is farther of opinion that, while the English cases, made upon a *different* law, are inapplicable as aforesaid, it ought not to be bound by the decisions of any of the subordinate tribunals in this country, (if there be any adverse to the opinion now declared,) because it is the province of this court to correct the errors of those tribunals when committed, and not to follow them because they have taken place;—and the most that could be contended for on this point would be, that this court, in a doubtful case, would be governed by a long series of decisions which have grown into a rule of pro-

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erty, and, being universally submitted to, would carry with them evidence of general assent and acquiescence;—nothing of which appears in the case before us.

Acting under the influence of these, among other reasons, the court condemns of error, and reverses so much of the decree before us as sets aside, in favour of the female appellee, the deeds of April 21st, 1800, and the deeds of May, 1809, in favour of the defendants *George Blakely, William H. Lightfoot, and Anne C. Lightfoot*, and as gives to the said appellee a part of the slaves and other estate thereby conveyed;—and also so much of the said decree as directs an account to be rendered of and concerning the slaves and other estate conveyed by the said deeds, and decrees in favour of the appellees the payment of the hires or profits thereof. The decree is to be reversed, so far as it conflicts with the opinion and decree now pronounced, with costs, and affirmed as to the residue:—and the cause is to be remanded, to be finally proceeded in pursuant to the principles of this decree.

Feb. 19th, 1816. *John E. Royall's administrators against Lucy Royall's administrator.*

1. A son being possessed of a life estate in certain slaves, with a contingent limitation, to his mother and her heirs, upon his dying without issue living at the time of his death;—the mother died in his life time, leaving him her only heir; and he afterwards died, without such issue:—the administrator of the mother brought an action of detinue for the slaves, against a person who was one of the co heirs and distributees, and also one of the administrators, of the son, (*but not charged as such in the declaration*), and obtained a judgment upon a case agreed, by which the parties rested the decision of the cause upon *certain specified points of law*; viz. whether the limitation to the mother was legal and valid; and whether (notwithstanding her death in the life time of the son, who was her only heir,) the slaves, so limited to her on his death, became vested in her administrator:—it was decided that such case agreed did not abandon or relinquish the title of the administrators of the son to the slaves in question; but the recovery was had in subordination to their ulterior right, arising from the circumstances, that all the debts of the mother had been paid by the son in his life time; that he died greatly indebted; and that the slaves in question were necessary to pay his debts; which circumstances, (though mentioned in the case agreed,) were not included in the points thereby submitted.

2. And on a bill in equity filed in their favour, the judgment was perpetually enjoined; on the ground that they, as representing him, were entitled to the slaves; and, *being in possession*, should not be compelled to relinquish that possession, and afterwards be put to the *circuity of another action* to recover them back. * See, to the same effect, *Wilson and Trent v. Butler and others*, 3 *Munf.* 559.

time in the year 1784, after having made and duly published his last will and testament, since admitted to record, of which a copy was made an exhibit; *Lucy Royall* being his widow, and *John E. Royall* his only son; that, after the death of the latter, (who died in possession of the whole estate left by the said testator, except what he had sold,) and eight years after the death of the widow, *Richard Eppes*, without the knowledge of the plaintiffs, obtained the administration of her estate, though her son *John E.* aforesaid had paid her funeral expenses and debts, and taken possession of all her estate; that the said *Richard*, having obtained this legal advantage, then brought a suit in the Petersburg district court against the complainant *John Royall*, holding as administrator of the deceased *John E. Royall*, for certain slaves which he the said *Richard* administrator of *Lucy Royall* claimed, as given to her by the will of her husband aforesaid; that, in the progress of that suit, a case was agreed, stating the facts correctly; and, thereupon, a judgment was entered for the plaintiff at law, which judgment was affirmed by the court of appeals.^(a)

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The complainants did not mean to controvert the propriety of that judgment, but contended that, although *Richard Eppes* as administrator aforesaid, was entitled to claim and to have the slaves recovered, yet, that he must hold them subject to the law of distributions; and, as it was a fact, stated in the case agreed, that no debts remained due from the estate of *Lucy Royall*, there could be no reason why the complainants, "who were the paternal uncles of the said *John E. Royall*, being his father's only brothers," should not be permitted to retain in their hands what the said *Richard* would be compelled to distribute between them.

(a) * * * See the
case of *Royall v.*
Eppes, 2 *Munf.*
479—491.

The complainants farther represented that *Eppes* was the nephew of the said *Lucy*, and pretended that he, in that character, as well as his brothers and sisters, were entitled to a portion of the estate of the said *John E. Royall*:—how far this might be correct, they submitted to the court to decide:—but, whatever might be the proportion to which the maternal as well as paternal relations of the said *John E. Royall* might be entitled, there could be no doubt that the debts due from the estate of the said *John E. Royall* must be first satisfied, and that the residue only would be liable to distribution.—They con-

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cluded therefore with praying "*such relief as their case required.*"

The record of the suit in the Petersburg district court, being exhibited with the bill, contained the case agreed, (partly set forth in 2 *Munf.* 479—481;) in which it was also stated, that *John E. Royall died greatly indebted; that the slaves in question were necessary to pay his debts; and that the defendant at law was the administrator and one of the co-heirs and distributees of the said John E. Royall, deceased.*

The answer of *Richard Eppes* admitted the truth of the facts set forth in the case agreed at law, but insisted that the plaintiffs, as representatives and distributees of *John E. Royall*, had no manner of claim to distribution of the estate of *Lucy Royall*, "for it is of *her* estate that distribution is demanded;" that the whole question arising in this controversy had been already determined in the court of law, and the plaintiffs stated *no equitable matter* on which they could ground their application for relief in equity; and that, the estate of *Lucy Royall* the mother, not being liable to the debts of *John E. Royall* the son, the plaintiffs had no claim to relief on that head.

Chancellor TAYLOR dissolved the injunction, and afterwards dismissed the bill with costs; from which decree the plaintiffs appealed.

February 19, 1816, Judge ROANE pronounced the court's opinion, as follows:—

This is a bill by the appellants administrators of *J. E. Royall* against the appellee as administrator of *Lucy Royall*, praying to injoin a judgment, whereby the latter recovered against *John Royall*, one of the appellants, four negroes, formerly the property of her husband *Joseph Royall*, deceased.—The ground the bill takes is that, admitting that judgment rightly decided the negroes to have been the property of *Lucy Royall*, and as such recoverable by her administrator to pay her debts, and for distribution, yet that the judgment should be enjoined;—for that it was agreed in that cause, and is now agreed in *this*, that all the debts of *Lucy Royall* were paid;—and on the further ground that the property in the said slaves, subject to her administrator's claim as aforesaid, was in *John E. Royall* as distributee to his mother, and is now in the appellants as his ad-

ministrators, is necessary to pay *his* debts, and that the surplus belongs to them as his legal representatives.—The appellants have not shewn in this suit, that they *only* are his legal representatives, even on the *paternal* side, and under a supposition that his estate is not to be divided into moieties under the act of descents; but, nevertheless, in their character of *administrators*, they may be entitled to recover.—If the debts of his mother are all paid, and the son, the intestate of the appellants, was her distributee, the appellants should recover as representing him; and being in possession of the property, should not be put to the circuitry of another action to recover back property taken from them under the judgment.—On inspecting the record referred to in this case, it appears that the judgment was rendered upon certain points submitted to the court, which do not go to abandon or relinquish the title of the son to the negroes in question; but the recovery was had in subordination to the ulterior right now asserted: nor are the appellants estopped, (as was argued,) by the agreement, in the case, that *John Royall*, one of the appellants, “was not the legal representative “or distributee of *Lucy Royall* ;” for if, as the fact is, *John E. Royall* was such distributee, and the appellants his distributees and administrators, *that* is sufficient to entitle them to recover.—It is also to be remarked, that, in that action, the appellants were *not sued* AS ADMINISTRATORS of *J. E. Royall*, and therefore, as against them, the appellee was clearly entitled to recover.—The judgment in that action declared the property to be that of *Lucy Royall*; subject, however, as is aforesaid, to this claim; the said *J. E. Royall* succeeded, as sole distributee to his mother, and having died without mother, brothers or sisters, or their descendants, the whole personal estate of the said *John E. Royall* is divisible into moieties, to go to the paternal and maternal kindred, according to the provisions of the act of descents.

The court is therefore of opinion, that the decree should be reversed, and the judgment enjoined; that the cause should be retained, and the appellants decreed to make up an account of their administration; and that the surplus, after the debts of the intestate *John E. Royall* shall have been paid, shall be decreed to be distributed according to the principles now declared; with liberty to the parties to this suit, and others supposing

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themselves entitled, to shew themselves to be so entitled, by being made parties or otherwise. And the cause is remanded, to be proceeded in pursuant to the principles of this decree.

Jan. 29, 1816. *Scott and Wife and Claiborne against Gibbon and Company, and Batte.*

1. A deed of marriage settlement executed before, and recorded after the marriage, but within the time required by law, is conclusive against the creditors of the husband, for debts contracted by him before the marriage. And this, although such deed was recorded upon the acknowledgment of the parties, without any privy examination of the wife.

THE appellants exhibited their bill to the chancellor of the Richmond district, setting forth that SCOTT (who was very much involved in debt) and his wife, before their marriage, entered into a marriage contract, by deed duly executed and recorded, whereby the property of the intended wife only was conveyed to *Claiborne*, in trust, that, from and after the solemnization of the marriage, he should permit the husband and wife during their joint lives to take and enjoy all the interest and profits of the property so conveyed: and that, after the marriage was solemnized, and the deed was recorded, *Gibbon and Co.* and *Batte* sued out executions on judgments they had respectively obtained against the husband before the coverture, and had those executions levied on the property of the wife so vested in *Claiborne* by the deed and for the purpose above mentioned. The prayer of the bill, therefore, was, that the defendants might be enjoined from proceeding with their executions against that property.

2. If plaintiffs in equity charge in their bill that a deed of marriage settlement under which they claim was executed before the marriage, though recorded afterwards; it being, also, expressed in the recital of the deed, that the same is made in contemplation of a marriage.

It distinctly appeared that the judgments of the defendants against *Scott* were obtained some time before the marriage. The deed, exhibited with the bill, bears date April 13, 1809. The marriage took effect, (as the appellants allege) shortly afterwards. The deed was recorded, on the acknowledgment of the parties without the privy examination of the wife, after the marriage, viz. at Dinwiddie county court, November term, 1809. There was no witness to it. The recital of the deed is as follows—"Whereas a marriage is *shortly intended to be solemnized*," &c.; and that allegation "between the said *William Scott* and *Mary Davis*; and where- be not denied or " as the said *Mary* is possessed of real and personal property noticed in the answer; it must be considered as admitted to be true, without farther proof.

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"during her life, and also some personal property in absolute fee simple, the former of which was devised and bequeathed to her by the last will and testament of her deceased husband, and the latter has been acquired by her since her widowhood; and whereas it hath been agreed that the said *William and Mary* should enjoy the interest and profits of the said estate jointly during their lives; now &c." *Scott* is party to the deed, in which it is expressed to have been made with his consent. The deed then conveys the said property by specific description, to the trustee *Claiborne*, his heirs, executors, &c., upon trust as therein declared, viz. "In trust for the said *Mary* till the solemnization of the said intended marriage; and from and after the solemnization of the said intended marriage, then in trust that the said *Claiborne*, his executors, &c. shall and do permit the said *William Scott* and *Mary* his intended wife, during the joint lives of them the said *William and Mary* his intended wife, to have, receive, take and enjoy, all the interest and profits of the said property, hereby conveyed and assigned, to and for their own use and benefit; and from and after the decease of such of them, the said *William and Mary*, as shall first happen to die, then upon trust that the said *Claiborne*, his executors, &c. shall, and do assign, transfer and pay over, all the said property, to the said *Mary* in case she survives the said *William*; and if the said *Mary* die before him the said *William*, to transfer, assign and pay over all such property, hereby conveyed to the said *William*, in which the said *Mary* has an absolute fee simple."

The chancellor denied the injunction, and assigned his reasons to the following effect:—"The question, whether a court of equity can interfere, in favour of a trustee, against the creditors of the *cestui que trust*? was not, as the plaintiff's counsel supposed, settled by the court of appeals in *Mrs. Copland's* cause; (1) as two of the judges have informed me. The question was in that case, as it is in this, should a court of equity interpose, to prevent a creditor from availing him-

(1) See *Wilson and Trent v. Butler and others*, 3 *Munf.* 559—565,—which was the case here alluded to:—but in that case, the trustees did not appear inattentive to their trust; and they, together with the *cestuys que trust*, were complainants, and obtained relief in equity.

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“ self of the benefit of the law, upon the conditions imposed
 “ by the law itself, (namely, to indemnify the officer,) unless a
 “ case were presented, that would make the interference of the
 “ court of equity proper in any other case? In that case, it was
 “ held, that *if the trustee was inattentive to his trust*, the court
 “ might interfere, at the instance of *cestui que trust*, as he has
 “ but the *equitable*, not the *legal* estate. But, in the case before
 “ me, *the trustee is stated to hold himself bound to interpose*; and
 “ the *law* furnishes him the means. Therefore, the court can-
 “ not yield its opinion to the counsel’s suggestions. Even if it
 “ had been settled, in the case referred to, that this court might
 “ interfere; still, this case would depend on the validity of the
 “ deed; for, unless it was recorded in the manner prescribed
 “ by law, Mrs. Scott parted with no right to the trustee. It is
 “ true it does not appear *when* the marriage was celebrated;
 “ but the deed, which is dated in April, states that the mar-
 “ riage was *shortly* to take place; and it is to be presumed, it
 “ did take place before the deed was recorded, in November
 “ following. It was recorded on the acknowledgment of the
 “ parties (for there is not a witness to it.) But Mrs. Davis
 “ was then a married woman; and (as the court is at present
 “ advised) had no powers to make an acknowledgment; at
 “ least, *in that way*. The property, then, of the wife, not hav-
 “ ing been conveyed in the manner prescribed by law, became
 “ the property of Scott her now husband: and I regard it as a
 “ well settled principle of the courts of equity, that their reme-
 “ deal power does not extend to the supplying of any circum-
 “ stance, for want of which the legislature hath declared the
 “ instrument to be void. So that, unless the plaintiffs can at
 “ least charge upon oath, that the marriage was *after* and not
 “ *before* the recording of the deed, the case should be left at
 “ law.”

Upon this, application was made to a judge of this court, by whom the injunction was awarded.

The defendants appeared and answered the bill. Their answers are, in effect, no more than the reasons given by the chancellor for denying the injunction, cast in the form of an answer.

The cause coming on to be finally heard by consent, the chancellor pronounced (in substance) the following opinion and decree :

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" The court being of opinion that the deed in the bill mentioned, not being *proved* to have been *executed and delivered*, before the intermarriage of the plaintiffs Scott and wife (two of the parties thereto) all *her* personal rights, which were liable to *her* creditors at the time of her marriage, vested in *him*, and in like manner became liable to *his* creditors: For the acknowledgment of the deed aforesaid, by the parties thereto, after the marriage, should not have relation back to the supposed date of the deed, in order to give it validity from that time, against the rights of third persons; and more especially in this case, since it no where appears to have been presented in court by the trustee, and acknowledged at his instance; an act which the female plaintiff was, at that time, incompetent to perform. Unless, then, it could appear by the deed itself, or other proof, that the female plaintiff, before *coverture*, divested herself of any right to the property mentioned in the deed, it follows, that, upon the marriage, it vested in the husband. Therefore, the court doth decree, &c. that the injunction awarded, &c. be dissolved, and the bill dismissed, with costs, &c."

From which decree, the plaintiffs appealed to this court.

Leigh, for appellants, insisted—1. That, supposing the marriage contract unimpeached, the bill presented a proper case for relief in equity; which, he said, had been decided by this court in *Mrs. Copland's* case. 2. That, as to the deed not being duly recorded, because the wife was not privily examined as to her acknowledgment thereof; the deed had been equally good as against the *husband's* creditors, had it been recorded on *his* acknowledgment alone. 3. That the fact of the deed being executed before the marriage, being distinctly alleged in the bill, and not denied or even noticed, in the answers was not in issue; and the court ought not to have presumed a fraud against one party, not only without proof by the other, but even without a pretension, that such fraud existed.

Call, contra, maintained the grounds of the chancellor's decree; and also contended, that the effect of the deed of trust,

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was, to vest in the husband and wife a joint *use*, during their joint lives, and the *profits* of the property thereby conveyed; which, in respect of the personal estate, was the same thing, as if the *property itself* had been vested in the husband and wife during their joint lives: that, therefore, the life estate of the wife in the profits of the personal estate, and of course, in the personal estate itself, vested in the husband, as soon as the marriage took effect: that consequently, during the joint lives of the husband and wife at least, the personal subject was liable to the debts of the husband, whether contracted *before* or *after* coverture: and that, in all events, the husband's possibility, in case he survived his wife, was liable to his creditors.

Leigh, in reply, said that Mr. *Call's* construction would defeat the plain intent of the deed; which was, that the husband and wife should, *both* be permitted to enjoy the benefit of the property during their joint lives; but the wife could not enjoy her part of such benefit, if the property was taken to satisfy the debts of the husband contracted *before* the coverture. He denied, that the use of the profits of the personal subject, was such an use as was executed into possession: the personal nature of the subject, and the terms of the deed, both excluded that proposition; to which point he cited Harg. co. Litt. 290. b. Note 1. Sect. 1.

February 21st, 1816. Judge ROANE pronounced the court's opinion as follows:—

The court is of opinion that the deed of settlement in the proceedings mentioned, having been made in contemplation of a marriage between a feme sole and her intended husband, a man very much indebted, and whose creditors, but for such a settlement, might, after the marriage, have swept away the property of the wife to pay the pre-existing debts of the husband, and left her in absolute indigence,—is founded upon a sufficient consideration, and ought not to be avoided in favour of the appellees, creditors of the husband anterior to the marriage.—The court is also of opinion, that, upon the true construction of that deed, which declares that *William Scott* and *MARY DAVIS*, two of the parties thereto, should enjoy the *interest and profits* of the property settled, *jointly* during their

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lives;—that the settlement was made *with the consent of William Scott* the intended husband;—that the trustee therein named *do permit* the said *William* and *MARY* during their *joint* lives to take and *enjoy* the said interest and profits, for *their own use and benefit*;—the idea of a *property* in the said *William* in and to the settled subject, during the coverture, is clearly reprobated. A contrary construction would not only defeat the avowed object of the settlement, by sweeping away the property as aforesaid, but is in utter hostility with that part of the deed aforesaid, which vests the property in the said *William* in the event of his surviving his wife;—in which case the trustee is directed to *transfer, assign and pay over* the property settled, to *William*; terms which, by contrast clearly import the contrary idea, in relation to the same, during the coverture.

As it is *conceded* in this cause, that the deed in the proceedings mentioned was executed prior to the marriage of the parties, and the same having been recorded, on the acknowledgment of the husband and his wife, within the legal term,—(without deciding what effect that acknowledgment and recording may have as to the wife or her creditors,) the court is further of opinion that the said execution and acknowledgment is conclusive as to the appellees the former creditors of the appellant *William*, there having been no instant of time during which the settled property was liable to satisfy their claims, and the same not having been contracted in contemplation thereof.

On these grounds, the court is of opinion to reverse the decree, and perpetuate the injunction;—but without prejudice to any proceedings which the appellees may, at any time, be advised to institute for the purpose of charging the contingent interest of the appellant *William* arising under the deed aforesaid.

Decree reversed.

Judge COALTER delivered the following separate opinion. This appears to me to present a proper case for the interposition of a court of equity, not only from the nature of a portion of the property, (*viz. slaves*.) which was about to be sold, and on which ground this court has, in several cases, determined that such interposition was proper, but on the ground of difficul-

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ty as to the extent of the debtor's interest, and how such interest can be reached by the creditor.

The object of the deed of trust, referred to in the bill, was either to preserve the use of this property to the husband and wife, during coverture, for their *joint maintenance*, and the profits, as they arose, to be applied in that way, clear and free from the creditors of, or purchasers from, the husband, or, what would be nearly the same thing, to the separate and exclusive use of the wife during the coverture, and consequently clear of his creditors, or purchasers under him, with remainder to the survivor; or the object was to secure it to husband and wife, in the usual way, during coverture, and then to the survivor; in which case the great object of the deed would be to secure the remainder to the survivor, leaving the husband the control during coverture. But, even in this latter case, the interest of the debtor, in that portion of the property which was to return to the estate of the first husband, would be different from that which had been acquired, and was held, by the wife in her own right:—as to the first, his interest would be for his own life, provided his wife should so long live, and, as to the latter, his interest would be during life, with remainder over in case he survived his wife:—or the deed may possibly admit of the construction that he, as joint tenant with her, was to take one half of the profits during life, if his wife so long lived, with remainder over in the property held in her own right, if he survived her.

If either of the first constructions should prevail, as the property would, by the deed itself, be free from the husband's creditors, then, on the principles of *Mrs. Copland's* case, the injunction ought to have been made perpetual; unless, indeed, the want of the proof stated in the decree was a proper ground for dismissing the bill. As to that ground, I consider the answer as impliedly admitting that the contract was entered into before marriage; because, in the answer to the bill, which alleges that fact, and refers to the deed, which bears date before the marriage, the parties defend themselves on one ground only, to wit, its not being duly recorded. At all events, such a waiver of that point of defence ought not to be permitted to entrap the party on the final hearing, but the court, if farther proof of that fact was considered material, ought to have insti-

tuted an inquiry on that point, especially as the bill was sworn to, which would be equal to the affidavit of the party that such was the fact, and against which a hasty presumption of fraud ought not to have been entertained, when the answer does not even call for farther proof.

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The recording of the deed was good as to the husband and those claiming under him, on his acknowledgment; and probably it was good, also, as to the wife, without privy examination; (but as to this I give no positive opinion;) for, though she is a grantor therein, it was a deed for her benefit, being intended to protect her estate from the marital rights of the intended husband, and in fact she took an estate thereby:—the deed would have been valid if the intended marriage had not taken place; but, on that event, it intercepted the husband's marital rights, and in fact operated as a deed from him for her benefit, in the same manner as if he had articted to convey and settle this property in this way, after marriage, and had made such settlement. But, again, when it was executed, she was free from that control which the law means to guard against, and if she had been privily examined, the inquiry would be, did she execute it freely? And was she still willing to be bound thereby? But, as the case declares her free at the time the deed was executed, why make the first inquiry? And, as she passed nothing when the acknowledgment was made, but was then confirming an estate in herself, why make the second?

If, however, neither of the two first mentioned constructions of the deed should prevail, and the result should be that the husband has, under one or the other of the latter constructions, an interest in this property, from which his creditors ought not to be excluded, I think the difficulty, as to the amount of that interest, and how the creditors are to obtain it, is such, that justice to either party was not likely to ensue from a *sheriff's* sale. These difficulties, to say nothing of the question whether the possession did or did not follow the use in this case, were well calculated to embarrass purchasers, and to occasion a great sacrifice in the sale. In this point of view, I think the preventive justice of a court of equity was properly applied to.

I am by no means satisfied that either of the two first mentioned constructions can be put on this deed:—I can find

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no case where the husband, or his creditors are excluded, except by express words of exclusion, or words from which that intention can fairly be drawn:—in this case, I can find no words which will justify me in drawing this inference;—on the contrary, this deed is drawn, I believe, in the usual way, where the great object is to secure the property, in remainder, either to the survivor, or to the issue of the marriage, leaving the marital rights of the husband, during coverture, untouched. There is no statement in the deed that the intended husband was in debt, and that the object was to secure the property against his creditors, or to provide a comfortable maintainance for the wife, who, in this respect, seems willing to share the fate of her intended husband during their joint lives, and is only desirous of securing her property to herself in case she should survive. Had it even been for her *livelihood*,^(a) this

(a) 3 *Alk.* 399.

(b) 2 *Eq. cases*
abr. 149—151.

(c) 1 *Fonb.* 203.

might perhaps have done. But if there is no foundation for a contrary construction, the case must be left to the operation of the law by which a married woman, unless there be some agreement to the contrary, gains no property in personal goods separate from the husband, as being against the rules of law and common right, in consequence of the unity of person which exists between them.^(b) Nor is this a case of *articles*, which the court might construe liberally.^(c) perhaps even as it respected the rights of creditors, but is a *deed* of settlement, which must be construed, as *all other instruments of that kind*, according to the plain meaning of the parties as supposed to be *fully* expressed therein; only resorting to extraneous matter in case of doubt and ambiguity. A woman about to marry, if she knows her intended husband is in debt, or if she doubts his prudent management, may guard her property against his marital rights during coverture, but the deed must manifest this intention:—every marriage contract has not this operation, which I fear will be the result of a construction that this has.

If then the husband took an estate in this property, either in whole or part, or a right to receive the whole or part of the profits, as they should arise during his life, which interest he could control, and could apply to the payment of his debts, or otherwise, and which his wife or trustee could not prevent, it would seem to me to follow that his creditors, whether prior or subsequent, ought to have the benefit of such his property;

and had they filed a bill to have this interest ascertained, and either sold, or the profits applied to discharge his debts, I think they ought to have been relieved in some way or other; and farther that, if his contingent remainder, in the proper goods of the wife, was too remote an interest to be sold, that a *lien* should be preserved to them thereon, with liberty to resort to the court for a sale thereof, in case he should survive his wife, so as to prevent any alienation thereof in the mean time. But can any decree be pronounced in this case, giving such remedy to the *defendants* in the cause, against the *plaintiffs*, as they would have been entitled to *as plaintiffs*? Or can we do more than perpetuate the injunction as to the proceedings on the execution, without prejudice to any suit that the appellees may be advised to bring?

I incline to think this latter is all that can be done.

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Isaac against Johnson.

Decided, February
22, 1816.

BY permission of the county court of *Campbell*, (on a petition filed,) a suit at law, *in forma pauperis*, was instituted November 13th, 1797, in behalf of *Isaac*, a negro man, claiming freedom, against *Peter Corbell*, who held him in slavery. A declaration was filed in the usual form of trespass, assault and battery, and false imprisonment:—the defendant pleaded, “that the plaintiff was a slave, and had not a right to sue for his freedom:”—the defendant replied, “he was a freeman by the laws of the land, and had a right to sue, &c. ;” whereupon, a jury was impannelled, but, not agreeing on a verdict, was discharged. At a subsequent term, viz. on the 14th of May, 1799, another jury found a verdict for the defendant, that the plaintiff was a slave; and, a motion for a new trial being overruled by the court, judgment was entered accordingly.

Shortly after this, *Thomas Johnson* having bought him from *Peter Corbell*, *Isaac* preferred another petition to the *Hustings*

1. Relief given in equity, in a pauper's suit for freedom, (1) by awarding a new trial at law, and, a verdict being certified,) decreeing for the plaintiff; upon a bill stating, that, in the previous proceedings, he had not been permitted to obtain his testimony; and on proof now produced in support of his right; notwithstanding the defendant pleaded in bar to such relief, a former verdict and judgment, by

which the plaintiff was declared to be a slave, and a decree of another court of chancery dismissing a similar bill, exhibited on his behalf; from which judgment and decree he had not appealed.

(1) Note. See in *Hudgins v. Wrights*, 1 H. & M. 134, pl. 3., another example of the favour shewn by the court to paupers suing for freedom.

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court of *Lynchburg*, for permission to bring a suit against *Johnson*, to try his right to freedom a second time ; which suit was accordingly instituted, and afterwards removed by *certiorari* to the superior court of law for the county of *Campbell*. Being advised by his counsel that the former judgment might be pleaded in bar against him, he also filed a bill in the superior court of chancery for the *Richmond* district, setting forth sundry grounds for relief in equity, and praying that the verdict and judgment in *Corbell's* favour, might be set aside, or that *Johnson* be restrained from using them as evidence in the action pending at law. Chancellor TAYLOR granted an injunction for that purpose, but, on the 1st of May 1810, dissolved it, and, the cause being heard " on the bill, answer and exhibits," on the 6th of June, 1811, dismissed the bill with costs. A non-suit was soon after suffered in the suit at law ; and, on the 9th of June, 1812, another suit in chancery was brought, on *Isaac's* behalf in the county court of *Campbell*, against *Johnson* and *Corbell* ; the bill praying that an injunction be awarded inhibiting *Johnson* from conveying or sending the complainant away, &c. ; that a new trial be granted him, and the verdict be directed to be certified to the chancery side of the court ; and for such other relief as might be deemed right and equitable.

The grounds of equity, set forth in this bill, were, in substance, that, in both the suits at law, and also in that in the superior court of chancery, the plaintiff being poor and ignorant, and under restraint of those who held him in slavery, had not been permitted, and was not able to procure the proper testimony in support of his right ; that, on the first trial of the suit against *Corbell*, *Johnson* himself was a material witness in favour of the plaintiff, but failed to attend at the last trial, when (the plaintiff's counsel having moved for a continuance, which the court refused,) the verdict was found against him ; after which, *Johnson* bought him of *Corbell*, with full knowledge of all the circumstances ; that, in fact, he had been unlawfully imported from *South-Carolina*, and kept in this state more than twelve months in violation of the act of Assembly ; whereby his right to freedom had accrued ; and that all this could be fully proved, if a fair opportunity were allowed him to take the necessary depositions. The county court granted the injunction prayed for.

Johnson, by his answer, denied generally, these allegations, and also pleaded, in bar of the plaintiff's claim, the verdict and judgment in the suit between him and *Corbell*, and the chancellor's decree dismissing his former bill of injunction.

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The defendant, *Corbell*, not appearing, an order of publication was entered, and the bill regularly taken for confessed, as to him.

The plaintiff replied generally, to *Johnson's* answer and plea, and proceeded to take depositions, by which the allegations in his bill were fully supported, so far as respected his right to freedom, and *Johnson's* knowledge of that right when he bought him. It was also proved, that *Johnson* had given important testimony in *Isaac's* favour at the first trial of the suit against *Corbell*, but failed to appear at the second trial; and that a motion for a continuance was made by the plaintiff's counsel, but overruled by the court.

On the 14th of February, 1814, a motion to dissolve the injunction was overruled, and the court awarded a new trial at law, the verdict to be certified, &c. In March, 1815, a jury was sworn at the bar of the same court, and found a verdict, "that the pauper, *Isaac*, is not a slave, but a freeman," which was ordered to be certified to the chancery side of the court. The 6th of May following, it was decreed and ordered, "that the original verdict referred to in the bill be set aside; that the pauper *Isaac* recover his freedom; and that the injunction in this cause be made perpetual."

Upon an appeal to the superior court of chancery, holden at *Lynchburg*, this decree was reversed, and the bill dismissed; whereupon *Isaac* appealed to this court.

Wickham for the appellant.

No counsel appeared for the appellee.

February 22d, 1816, the president pronounced the court's opinion, that the decree of the superior court of chancery be reversed, and that of the county court affirmed.

Decided March
2, 1816.

Chichester against Boggess.

1. If the count upon a writ of right be in behalf of two demandants, a plea opposing the claim of one, without mentioning that of the other, is defective:—and if, without any replication by the demandants, a verdict be found and judgment rendered in their favour, such judgment must be reversed, and all the proceedings, subsequent to the count, set aside.

UPON a writ of supersedeas to a judgment in favour of *Samuel Boggess* and *Henley Boggess* demandants in a writ of right against *Doddridge Pitt Chichester*. The count was in the form prescribed by law, for a tenement containing 103 acres of land in the county of *Fairfax*, bounded, &c. The defendant by his attorney came and defended the “right of the said *Samuel Boggess*, when and where it behoved him, and all that concerned it, and whatsoever he ought to defend, and chiefly the tenement aforesaid with the appurtenances as of right, namely, &c., bounded, &c.; put himself upon the assize, and prayed recognition to be made whether he had greater right to hold the tenement aforesaid with the appurtenances, as he then held it, or *the said Samuel* to have it as *he* then demanded it.” To this plea, there was no replication; yet a jury was impannelled, and found a special verdict, on which the court entered judgment for the demandants. The writ of supersedeas was awarded, by this court, on the petition of the defendant.

March 2d, 1816, the president pronounced the court’s opinion, as follows:

“The court, without deciding on the merits of the cause, is of opinion that the proceedings therein, and judgment thereon, are erroneous, in this, that the plea is defective, as it does not answer the count as to the demandant, *Henley Boggess*; nor is there any replication to the plea. The judgment is therefore reversed with costs; all the proceedings subsequent to the count are set aside; and the cause is remanded for farther proceedings.

March 6, 1816.

Medley against Jones.

1. A bond to stay execution on a judgment was assigned for value received; without notice to the assignee of any equity against it; and after dissolution of an injunction to the judgment. The security in said bond, who was also attorney in fact for the principal obligor, paid it off, without execution, and without any particular instruction to do so:—after which, the chancellor re-instated the injunction. It was held that such payment by the attorney in fact was

county, to recover back a sum of money paid, under the following circumstances, disclosed by a bill of exceptions signed and sealed at the trial.

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On the 4th of May, 1803, the plaintiff *Jones*, upon his bill for that purpose exhibited, obtained, from the judge of the superior court of chancery for the Richmond district, a writ of *ne exeat* and injunction, against a certain *Elizabeth Rogers*, to prevent her removing from this state certain slaves, (in which, by virtue of a bill of sale from the said *Jones*, she had a life estate, with a reversion to him in fee,) until security should be given for their production to him at her death. During the pendency of this suit in chancery, one of the slaves, by the name of *Aaron*, having come into the possession of *Jones*, and being detained by him, *Elizabeth Rogers* brought her action of detinue to recover that slave with damages for the detention; and, at Halifax May court 1807, a verdict was found and judgment rendered in her favour for the said slave, and 100*l.* damages, besides her costs. In the preceding month of March, the chancellor had decreed that if bond and security according to the prayer of the bill, were not given, within three months from the end of the term, the slaves in question should then be delivered into the custody of the complainant, to be by him held, as his own goods and chattels, during the life of the said *Elizabeth Rodgers*, or until such bond and security should be given, as aforesaid; that, in the event of their being delivered to the complainant, *he should account for the annual profits thereof, to her, during her life, or until such bond should be given, &c.* In the same year 1807, the complainant obtained an injunction against *Mrs. Rogers*, forbidding her proceeding to carry the judgment aforesaid into effect, and intended to enforce a compliance with the decree. In February 1809, this injunction was dissolved; and, *Mrs. Rogers* proceeding to enforce the judgment, the said *Jones*, with *John Baynham*

a waiver of the equity in behalf of the principal, who, therefore, notwithstanding the re-instatement of the injunction, was not entitled to recover back the money paid.

2. A person entitled to a remainder in fee, expectant upon a life estate, in slaves, taking them into his own possession to prevent the tenant for life from carrying them out of the state, is bound to account for and pay their hire or profits while he detains them, and is not entitled, upon the ground of the tenant's refusing to give bond and security for their production at the expiration of the life estate, to an injunction, to stay proceedings upon a judgment, against him, for such hire or profits.



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his security, on the 22d of May following, gave a bond to stay execution, according to the act of assembly, passed the 31st of January 1809, entitled, "an act concerning executions, and "for other purposes;"—which bond was assigned for value received, to *George Rogers*, and by him, in like manner, to *Isaac Medley*, in April 1810. This bond was given under the law then in force, on account of so much of the said judgment as was rendered for the damages and costs. On the 28th of May, 1810, *John Baynham*, the security above mentioned "who was also *Attorney in fact* for the plaintiff," paid off the bond to *Medley*, "without execution, and without any particular instruction from *Jones*."

On the 16th of June 1810, the chancellor set aside the order dissolving the last mentioned injunction, and ordered that "*the rights of Mrs. Rogers, acquired by the said judgment, be altogether suspended, until she comply with the decree pronounced in March 1807.*" Of this order, neither *Baynham*, nor the defendant *Medley*, had notice at the time of the payment aforesaid. It did not appear that the decree of March 1807 had been complied with; but the negro had, ever since the judgment, remained in *Jones's* possession.

Upon this statement of facts, the plaintiff moved the court to instruct the jury, that the action was maintainable;—which instruction was accordingly given. The jury thereupon found a verdict, and judgment was entered for the plaintiff, from which the defendant appealed to this court.

March 6th, 1816, Judge ROANE pronounced the court's opinion.

The court, considering that the money now in controversy was paid by the agent of the appellee to the appellant, an assignee without notice of any equity existing against the bond assigned;—which appellee, by his said agent, was competent to waive the assertion by the alleged equity, in relation to such assignee, and, farther, considering that the said money properly accrued to *Mrs. Rogers*, (under whom the appellant claims,) according to the principles of the decree of March 16th, 1807, as the hire or profits of the slave *Aaron*, during her life;—is of opinion, that the instruction given by the court was erroneous, and that a contrary instruction ought to

have been given upon the case stated in the bill of exceptions. The judgment therefore is reversed, and a venire de novo awarded, in which no such instruction is to be given.

Garth's executors against Barksdale.

Decided March 7th, 1816.

THIS was an action of trespass in the superior court of Albemarle county, originally brought by *Goodman Barksdale* against *Thomas Garth* sheriff of that county, for unlawfully seizing two slaves belonging to the plaintiff.—Plea “not guilty,” and issue. The cause being continued at October term 1812, it was agreed that it should not abate by the death of either party. In fact, the defendant died before the ensuing term, when his executors came into court, and made themselves parties. (a.)

At the trial, the defendants filed exceptions, stating, “that this action was brought against the defendants’ testator for an illegal seizure and sale of slaves, by one of his deputies, under an execution duly issued against a certain *Douglas Barksdale* :—the defendants proved that the said negroes were, at the time of their seizure, in the said *Douglas Barksdale’s* possession :—the plaintiff claimed them, as having been the original owner, and only having lent them to said *Douglas Barksdale*, who had married his daughter :—the defendants undertook to prove that the slaves had been in said *Douglas Barksdale’s* peaceable and uninterrupted possession for five years from the time when they were first loaned him, and before the service of the execution :—the court instructed the jury that, if the slaves loaned by the plaintiff to *Douglas Barksdale* had, before the expiration of the five years, been returned by the consent of the lender and borrower, that would interrupt the possession ; and that, even if the borrower, after five years possession of the slaves, had surrendered the same to the lender, the lender’s right to the slaves became revested in him, so as that, in neither case could an execution, in behalf of a creditor against the borrower, which issued subsequent to the last return of the slaves into the borrower’s possession, be levied on said

1. Five years peaceable and uninterrupted possession of slaves, under a loan not evidenced by deed duly recorded, vests a title in the loanee, which endures in favour of his creditors, and cannot be divested as to them, by his returning the same to the lender, after the said five years have expired. * See *Gay v. Mosley*, 2 Munf 543-546.

(a) See Rev’d. Code, 1st vol: ch. 92, sect. 58, p. 167.

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"slaves, although in the borrower's possession at the time of
"levying said execution, unless five years had again elapsed
"after the possession of said slaves was restored to the bor-
"rower :—to which opinion of the court, the defendants
"excepted."

Verdict for plaintiff for \$670 damages :—Judgment *de bonis testatoris* ; from which the defendants appealed to this court.

Wickham for the appellants.—Whether the court's instruction to the jury was correct, or not, depends upon the statute of frauds. This case is obviously within the letter of the law, and still more clearly within its meaning. A loan must be considered, *in relation to creditors*, as vesting the absolute property in the borrower after five years possession, unless it be evidenced by writing ; though, *as between the parties*, the lender may assert his right at any time. The object of the law is to prevent the holding out of false titles. A loan is not a transfer for *valuable* consideration, which is good against creditors.

Leigh for the appellee. For aught which appears in the record, the opinion of the court did not obstruct the proof which the defendants undertook to adduce ; nor at all conflict with the defence set up by them. The instruction given was upon a mere abstract question not applying to the case ;—for the proof on the part of the defendants was that *Douglas Barksdale* had been in uninterrupted possession for five years next before the levying of the execution ; and no motion appears to have been made to the court for any instruction to the jury.

But if the opinion of the court can be applied to the case stated in the bill of exceptions, that opinion is correct ; being almost in the very words used by this court in *Beasley v. Owen*, 3 H. & M. 449—458. This court is not studiously to hunt out errors in the judgment. If a case might exist to justify the instruction, it ought to be presumed that such was the case, unless the contrary appears. The judgment is presumed to be right, if it do not appear to be erroneous. It is not incumbent on me to shew it was right, but on the appellant's counsel to shew it was wrong.

Wickham in reply. The defendant only undertook to prove a possession of five years;—not of five years *next before the execution*: he contended that possession for five years “before” the execution, (though not the five years *next before* it,) was sufficient. The case of *Shelton, v. Cocke, Crawford & Co.* is a clear authority to shew that the instruction must be understood as applying to the case before the court. The instruction given is clearly erroneous. The court ought to have said, “provided such re-delivery was *open and public*.” The spirit and intention of the law is to prevent secret trusts to the injury of creditors. If a mere taking back of the property, and re-delivery, (after the five years possession had vested the property in the donee for the benefit of his creditors,) should be considered sufficient to defeat the claims of creditors, it would amount to a repeal of the statute of frauds. No matter *when* we became creditors;—no matter how far we were imposed upon by this act of the party;—the court’s opinion was a bar to the admission of our evidence. And, whether this instruction was given asked or unasked, it led to an erroneous decision by the jury. The judgment therefore must be reversed.

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March 7th, 1816, the president pronounced the opinion of this court.

“The court is of opinion that the instruction of the superior court is erroneous in this, that the five years possession of the negroes by *Douglas Barksdale*, if proved, vested a title in him which enured in favour of his creditors, notwithstanding he might thereafter have returned the same to the plaintiff from whom he had derived them.—The judgment is therefore reversed, the cause remanded, for a new trial to be had therein, on which no such instruction is to be given, but one, if required, correspondent with this decision.

Scott and Wife *against* Halliday and Hinton.

Decided March
16, 1816.

WILLIAM SCOTT and *Mary* his wife, formerly *Mary Davis* 1. If a *fieri* widow of *Edward Davis* deceased, presented a bill of injunction *facias* against the goods of a testator be levied on slaves, which, by his will, were *specifically* bequeathed, and after his death were allotted to the legatee by the executor, who thereupon held them, and hired them out, as *guardian* for

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tion to the judge of the superior court of chancery for the Richmond district, stating that the said *Edward* died about the month of October, 1806, seized and possessed of a considerable estate, real and personal;—that, before his death, he duly made and published his last will in writing, in which, (among other things,) he bequeathed to the plaintiff *Mary* certain slaves for her life, and certain other slaves to *Martha E. Davis*, (a posthumous child,) as her own absolute property;—that *Hardaway Manson* was appointed, and lawfully qualified as executor of the testator, and guardian of the said *Martha E. Davis*, and, in the course of his administration as such *delivered* to the plaintiff *Mary* the slaves devised to her as aforesaid for her life, and *held*, in his character of *guardian* aforesaid, the slaves devised to *Martha E. Davis* his ward, as aforesaid, which circumstances ought to be regarded (until the contrary should appear,) as conclusive proof that independently of the said slaves, the said executor possessed enough of his testator's estate to pay every debt chargeable thereon; for debts are certainly to be paid before legacies, and, therefore, whenever an executor shall discharge legacies, the inference inevitably is, that all debts have been paid, or that they are ready to be paid by the executor.

The complainants farther stated that, the securities of the said executor for his administration having demanded counter-security, which he failed to give, administration *de bonis non* with the will annexed was granted to the plaintiff *Mary*, then *Mary Davis*; that, after the death of *Hardaway Manson*, she also qualified as guardian of the said *Martha E. Davis*, and in that character was possessed of the slaves devised to her;—that, in their opinion, they had fully and faithfully administered all the estate of the said *Edward Davis* which had come to their hands to be administered;—but of this they were ready and willing to render an account;—that, since their intermarriage, a judgment had been lately obtained against them, as administrator and administratrix, in the superior court of law

such legate;—a court of equity ought, by injunction, to stop the sale, until an account of the assets remaining unadministered shall be taken, and upon such account, to decree that the creditor shall be satisfied out of those assets;—or, (if there be a deficiency,) out of the residue of the estate of which the testator died possessed; having regard to the rights of the several legatees under the will. * See *Burnley v. Lambert*, 1 Wash. 312;—*Randolph v. Randolph and others*, 3 Murf. 99; and *Wilson and Trent v. Butler and others*, *Ibid.* 559.

for Dinwiddle county, by *Halliday* and *Hintons*, for the sum of 139*l.* 5*s.* 7 1-2*d.* with legal interest thereon from the 4th day of September, 1807;—the suit in favour of the said *Halliday* and *Hintons* having come to trial *unexpectedly*, which prevented their shewing, under the plea of *plene administravit*, that no assets remained in their hands:—that, a writ of *facri facias* being issued upon the said judgment, was levied on three slaves the property of *Martha E. Davis*, acknowledged to be such, and held as such, not by the complainants only, but also so previously held by the said *Manson*; that, in performance of the duty which he owed to his ward, the complainant *William Scott* forbade the sheriff to levy the said execution upon those slaves; which he nevertheless persisted in doing, and would proceed to sell them, unless restrained by the court. The plaintiffs therefore prayed an injunction to stop the sale, and for such other relief as their case required;—making the said *Halliday* and *Hintons*, and also *Thomas Parham* acting administrator of *Hardaway Manson*, defendants to their bill.

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Chancellor *Taylor* refused to grant an injunction according to the prayer of this bill; but it was granted by *SPENCER ROANE* a judge of the court of appeals;—judges *BROOKE*, *CABELL* and *COALTER* concurring, and judge *FLEMING*, being absent.

The defendants *Halliday* and *Hintons* filed their answer, stating that, after every effort had been used by the complainants to defeat their claim, (the justness of which is not controverted,) they obtained their judgment at law, and sued out execution; that the same was levied on negroes, which were the property of the said *Edward Davis* in his life time; that they were informed, and most sincerely believed, that no *assignment* was made to the widow, or to *Martha E. Davis*, of the negroes bequeathed to them respectively:—there was no evidence of it on record; nor did the fact ever take place; but, if it did, the complainants were bound to prove it; and, even in that case, as they had voluntarily brought themselves before a court of equity, the court ought to pronounce exactly such a decree as if the respondents had instituted a suit therein. If, however, such an assignment was made, it was strange that the widow should have taken on herself the burden of administering on the estate, (when, if the allegations of the complainants were true,

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the estate was nearly, if not entirely, administered;) and that she should not have pleaded that fact to the suit. The respondents remarked, to shew the fraudulent conduct of the complainants, that, whenever a judgment was obtained against *Scott* for a debt contracted by himself, a marriage contract was exhibited by the wife as a bar to the levying of the execution; that if a judgment was obtained against herself as administratrix, then the property was shielded by its having been assigned and allotted to her by the executor; and if a judgment was obtained against *Scott* and wife, for a debt contracted by herself while a feme sole, then the property belonged to the estate of *Edward Davis*, and no disposition could be made of it until his debts were paid off and extinguished. Yet they paid no debts of any description or character!

The answer of *Thomas Parham*, administrator of *Hardaway Manson*, stated, that, shortly after the complainant *Mary* qualified as administratrix of *Edward Davis*, an order was made by the county court of Dinwiddie, requiring certain gentlemen to examine, state and report the accounts of the said *Hardaway Manson* as executor; that, in compliance with that order, the commissioners did report a balance to be due from the said executor, amounting to about 160 or 200*l.*; that, shortly afterwards, the complainants *Scott* and wife instituted a suit against said *Manson* to recover that balance, and a judgment was confessed by him in their favour for the same; that, the said judgment not having been paid in the life time of the said *Manson*, a *scire facias* to revive it was sued out by the complainants against this respondent and *Joanna Manson* as administrator and administratrix of said decedent; which *scire facias* was still pending in the county court of Dinwiddie; that this respondent had made to the complainants several payments in part of said judgment, and meant to pay the balance, unless this court should direct otherwise: but he insisted that the settlement aforesaid was final and conclusive between the said *Davis's* estate, and the said *Manson's*, unless fraud or mistake could be shewn; and that the complainants had made it binding on them by accepting it, and suing for, and receiving a confession of judgment for the amount. "After this, it surely cannot be contended that this respondent is accountable to "*Halliday* and *Hintons*, and to the complainants too; or that

“ *Manson* acted improperly in settling with them the balance due to his testator; in as much as the law transferred upon them the duty of paying all outstanding debts against the estate: as little can it be contended that *because he gave up the slaves* to the widow and orphan of his testator, perhaps prematurely, therefore that property, and the complainants, in whose hands it is, should be exempted from the payment of those debts.”

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Chancellor TAYLOR dissolved the injunction at June term, 1813. Certain affidavits, upon due notice, were afterwards taken in support of the bill; proving, in substance, that the slaves bequeathed to *Martha E. Davis*, as aforesaid, were allotted to her by *Hardaway Manson*, and hired out for her benefit by him as her guardian. A motion was then made, in vacation, for re-instatement, which the chancellor overruled; but made an endorsement upon the papers, “ that those affidavits might be considered as a part of the record in this case, and, as if they had been filed before the motion was made for a dissolution; that the plaintiffs might, in their application for an appeal from that order, have the full benefit of them.”

Upon a petition presented for that purpose, an appeal was granted by a judge of this court.

Saturday, March 16th, 1816, the president pronounced the court’s opinion :

The court, considering the papers referred to in the endorsement of the chancellor of the 20th of August, 1813, as a part of the record, and it appearing by the proofs therein that the slaves, on which the execution of the appellees *Halliday* and *Hinton* was levied, are a part of those devised by *Edward Davis* to his daughter *Martha E. Davis*; and further that they had been duly allotted to her, among others, as a legacy, by *Hardaway Manson*, the executor of the said *Edward Davis*, and had been hired out by the said *Manson*, as her guardian, for the benefit of the said *Martha E. Davis*, is of opinion that the said order, dissolving the injunction awarded by one of the judges of this court with the assent of three other judges, is erroneous. Therefore it is decreed and ordered that the same be reversed, with costs; and that the cause be remanded to the said court of

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chancery, in order that an account may be taken, before one of the commissioners of that court, of the administration *de bonis non* of the estate of the said *Edward Davis* by *William Scott*, one of the appellants, in right of his wife *Mary*, the other appellant, to whom administration of the estate of the said *Edward Davis*, with the will annexed was granted, previous to their marriage; and that, if it shall appear, on the report thereof, to be made by the said commissioner, that assets of the said *Edward Davis* remain in the hands of the said appellants sufficient to satisfy and discharge the execution of the appellees *Halliday* and *Hinton*, the appellants be decreed to pay the amount thereof out of the said assets; but if it shall appear by the said report that the said assets are insufficient to discharge the said execution, or any part thereof, then, and in that case, the deficiency to be made up out of the residue of the estate of the said *Edward Davis*, having regard to the rights of the several legatees under his will.

Decided March
20th, 1816.

Carter's executor against Carter and others.

1. A partition, which has long been acquiesced in, and acted upon by the parties generally, ought not to be disturbed at all on the ground of irregularity only; though if unjust or illegal it may be impeached by a party who never acquiesced.

THIS was a suit in chancery, in behalf of *Charles Carter* (of Shirley,) and others, against *Robert Carter* of *Nomony*.

The bill stated that *Robert Carter* (of Corotoman,) *Robert Carter* (of Nomony,) *Charles Carter* of Cleve, and *Mann Page* (of Rosewell,) entered into a partnership as tenants in common, for working a copper mine adjoining a run, called *Frying Pan*, in the then county of Stafford, and sundry agreements respecting the same, and for the purchase of some adjoining lands; after which, the said *Mann Page* died, having first devised

2. Under the circumstances of this case, one of the persons entitled to partition having been in possession and enjoyment of the whole land for many years, through want of knowledge of the title of the other partners, to whom he made their title known, immediately after it was discovered by himself; upon a bill filed by them for partition, it was considered equitable that he should account for their proportions of the rents received by him, deducting his disbursements for securing the title; that all the leases, and agreements of lease, he had made of the land should be acquiesced in by the plaintiffs; and that, for a part which he had sold, he should pay the price received, with interest from the time of the sale; the time when he received it not appearing to be different from that of the sale.

3. Interest also would have been allowed the other partners, on their proportions of the rents received by him, from the time of filing their bill; but, by their consent, it was allowed from the beginning of the next year after the last receipt.

his share among his six sons, *Ralph, Mann, Carter, John, Matthew* and *Robert* :—that this devise was confirmed by the surviving partners by a written agreement, under which the said lands and the slaves belonging thereto were held by *Charles Carter* and *Robert Carter*, and finally by the latter only, from whom they came to *Robert Carter* the defendant : but, in the mean time, the owners disposed of their respective interests, as follows, viz. *Robert Carter* (of Corotoman) devised his fourth to his son *John* in tail male, whose son and heir was the plaintiff, *Charles Carter*, (of Shirley,) who was also heir to the said *Robert Carter* of Corotoman :—*Charles Carter* (of Cleve) devised his fourth to his sons *John* and *Landon*, of the first of whom the plaintiff *Anne Lyons* was the heir and representative, and the latter said he was entitled either to the whole or a moiety of his father's share :—that the plaintiff's representatives of *Mann Page* did not agree in the construction of his will ; and stated then several pretensions :—that *Robert Carter* the defendant, on the 28th of January, 1778, addressed a letter to *Mann Page*, *Charles Carter* of Shirley, and *Charles Carter* of Stafford, in which he informed them of his having seen a copy of the deed of copartnership of the 4th of November 1731, and stated that, if there had been no written agreement to invalidate it, he could see no good reason for his keeping the whole, and was willing to make partition ; mentioning at the same time that a tract of 3390 acres had been sold by him to one *Semple* in 1762, which he was willing to have included in his allotment, or to pay for it the money received, with interest.

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The prayer of the bill was for a division of the lands, slaves and stocks ; and of the rents and profits, and for general relief.

Robert Carter (of Nomony,) by his answer, admitted the partnership ; but denied that any slaves, utensils, or other personal property, ever came to his hands. He alleged that, in the year 1749, when he came of age, the property in question was delivered to him, with the rest of a very large estate, by his guardian *John Carter* late of Shirley, and *Charles Carter* of Cleve, two of the persons interested in the original partnership ; from which period the defendant continued to rent the lands, sold the tract to *Semple*, and acted in every res-

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pect as the absolute owner, which he supposed himself to be; that, having accidentally discovered the title of the plaintiffs, he immediately wrote the letter in the bill mentioned. He was willing to account for the profits actually received; but his father and himself had made disbursements on account of the said lands;—especially for a re-survey thereof, by which a large quantity of surplus land was secured to the partners; of which disbursements, he would produce a copy from his books.

In an amended answer, he stated that, before he discovered the title of the plaintiffs, he had made sundry leases, which, as well as his sale to *Semple*, ought to be confirmed by the decree to be rendered between the parties.

The chancellor made an order for a division of the lands, and an account of the profits; upon which, the commissioners reported that they had divided the lands into four lots; one of which was allotted to the representatives of each of the original partners. A report on the subject of the profits was also made by them, but was afterwards referred to commissioner *Keith*, who reported a balance of 162,790lbs. of tobacco, and 3554l. 11s. 1d. in money, to be due from the defendant.

In September, 1797, the defendant filed exceptions to the report of partition:—1st, because the commissioner had included in the allotment to *Charles Carter* the tract sold by the defendant to *Semple*; although the defendant had offered originally to account for the price of that tract, “with interest from the time he received it,” or to take the tract into his own allotment:—2d, because the report had paid no regard to the leases made by the defendant.

In May 1798, the court confirmed the report respecting the lands, as to all the parties, except *Charles Carter* of Shirley, and *Robert Carter* of Nomony, as to whom, “by consent of parties,” it directed the allotments to be exchanged, so that *Robert Carter* might have the lot which contained *Semple's* tract;—and, as to so much of the bill as claimed an account of slaves and their profits, directed the same to be dismissed;—without prejudice, however, to any future demand of such slaves and profits. But, on the 3d of October following, the court, “being satisfied that the defendant did not consent to the exchange of purparties between him and the plaintiff *Charles Carter*, as was, from a mistake by the counsel of the former,

“supposed in the decree pronounced in this cause, on the 14th
 “of May last, did, *on motion of the defendant by his counsel*
 “*set aside so much of the said decree as ratified that exchange,*
 “*and, instead thereof, establishing the partition reported by the*
 “*commissioners,* adjudged, ordered and decreed that the plain-
 “*tiff Charles Carter* and the defendant do hold in severalty
 “the purparties allotted to them, respectively, by the com-
 “missioners.”

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No decree having been made concerning the profits of the lands ; and several of the parties having died ;—a bill of revivor was filed, in January 1807, by the representatives of *Charles Carter* of Shirley, and the rest of the plaintiffs, against *George Carter* executor of *Robert Carter* of Nomony, and the heirs of the said *Robert Carter* ;—stating the nature of the suit, the proceedings and interlocutory decrees, and complaining of the alteration made in the allotments by the last mentioned decree. On this subject, the bill of revivor stated, that *Charles Carter* had brought an ejectment, for the land sold to *Semple*, against the persons now in possession, who thereupon pleaded the act of limitations ; that the cause was decided by the district court in favour of the defendant, but that the plaintiff had appealed, and the controversy remained undetermined. The plaintiffs therefore prayed that the lot first decreed to *Charles Carter* (of Shirley,) be restored, or that indemnification be made to them for the alienated land.

A subsequent bill of revivor, rendered necessary by the deaths of other parties, stated, that the judgment in the ejectment had been affirmed by the court of appeals, (1) and prayed for general relief.

The answers of several of the representatives of *Robert Carter*, stated that, by his last will, he charged his personal estate ; (which he gave to his son *George*.) with the payment of his debts ; and devised his Frying Pan lands to his other children. They therefore prayed that the defendant *George Carter* might be compelled to make satisfaction to the plaintiffs, if any should be decreed.

The answer of *George Carter* referred to his father's answer to the original bill, and said he was desirous, as his father

(1) Note. See the case of *Carter's trustees v. Washington and others*. 2 H. & M. 345—365.

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had requested, that the land sold to *Semple* should be allotted to his estate.

The court in June 1810, decreed that *George Carter*, executor of *Robert Carter*, out of the assets in his hands should make compensation to the executors of *Charles Carter*, (of Shirley,) for the loss of the land sold to *Semple*, "and would have proceeded to direct an issue to ascertain the value of the said land at the time of the sale thereof as aforesaid;" but, by consent of the plaintiff's executors of *Charles Carter*, that value was fixed at the sum which *Semple* paid for it, with interest:—the court then directed one of its commissioners to take an account of the personal estate of the said *Robert Carter*, deceased.

At February Term 1811, leave was granted to *George Carter* to amend his answer; and it was agreed between the parties, by their counsel, that such amendment should not impede the trial, and that the suit should not abate by the death of any of the parties.

The amended answer of *George Carter* stated the order for setting aside the exchange of allotments between *Charles Carter* and *Robert Carter* was made *without the knowledge of the latter*, who, always, in conformity with his answer to the original bill, wished the land sold *Semple* to be included in the allotment to himself. (1) This respondent required the plaintiffs, executors of *Charles Carter*, to shew their authority to accept a *pecuniary* compensation for the loss of the land sold *Semple*; insisting that satisfaction ought to be made out of the real estate of the said *Robert Carter* in Virginia, or out of the share of the Frying pan lands which fell to *Robert Carter*. This position he endeavoured to support from the intention of

(1) Note. The decree of October 1798. (setting aside the exchange of allotments, made, "by consent of parties," in May 1798) was founded on the affidavit of a certain *Benjamin Dawson*, stating "that he was agent for the defendant; that, before the division by the commissioners took place. he objected to the including of *Semple's* tract in the defendant's share; that he was answered that the difficulty would be removed by his taking *Charles Carter's* share for the defendant;—which he declared himself willing to do. if it was made equal in value to the others; that he either informed, or meant to inform, the defendant's counsel of these circumstances, and that he dissented to taking this lot for the defendant, because it was inferior in value to the other allotments; but was mis-understood by him."

that testator, as apparent from circumstances, and written documents exhibited with the said amended answer.

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It appeared from these documents that *Robert Carter*, having an estate consisting of many thousand acres of valuable land in Virginia, residing himself in Maryland, and having ten children, on the 13th of May, 1795, wrote a letter to *Spencer Ball*, the husband of one of his daughters, for the information of all his children, proposing to divide his lands in Virginia into ten equal shares; each of his children to take one by lot; to pay him an annuity during his life, of one thousand dollars, specie, to satisfy *all demands* against him relating to his Virginia concerns; the whole landed estate (except a small tract in Fairfax county) to be subject thereto; and they to indemnify him by a joint bond and mortgage against every suit at law which had been or should be commenced against him. This proposal was, in part, but not completely, carried into effect.

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The defendant *George Carter*, afterwards, admitted before the commissioner personal estate, of his testator, in his hands to be administered, sufficient to satisfy the demand of the plaintiffs, if the court should think him liable for it.

On the 10th of June, 1812, the account of profits heretofore reported in this cause was referred to commissioner *Nicholson*, who was also directed to state the amount thereof due the respective parties. Upon his report the court, having caused the cash value of the balance due in tobacco to be ascertained by a jury, decreed, 1st, to the respective parties the several sums found due to them by that report. (2) with interest on each sum from the 1st day of January, 1798; and, 2dly, that *George Carter* should pay to the executors of *Charles Carter*, of Shirley, the price given by *Semple* for the land purchased by him, with interest from the time of the sale thereof by *Robert Carter* to *Semple*:—(3) saying nothing of the leases

(2) The chancellor's opinion was, "that a receiver of rents and profits should, like a receiver of a principal debt and interest for a third person, account for the same with interest, which, in this case should commence from the filing of the bill," (which took place on the 5th of June, 1794,) "but for the consent of the plaintiffs to take interest from the beginning of the year after the last rent was received."

(3) The time when *Robert Carter* received the money of *Semple* did not appear. The date of the deed was the 2d of November, 1782.

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which Robert Carter had made of part of the Frying pan lands, before he discovered the title of the plaintiffs.

From which decree, George Carter appealed to this court.

Wickham for the appellant.

Call, Wirt, and Nicholas, for the appellees.

March 20th, 1816, the president pronounced the following as the court's opinion.

It seems to the court here that the partition of the lands in this case, was made under an interlocutory decree, which proceeded on the principle, that the sale by Robert Carter to *Semple* was null and void ; and the lands embraced by that sale were included in the division, in the same manner as if the sale had never been made. If the sale to *Semple* were now to be regarded as null and void, the partition, as first made, would undoubtedly be confirmed by this court, as there is no evidence of any inequality. That principle, however, was abandoned by the final decree ; and this court thinks that it was correctly abandoned, under the particular circumstances of the case. The chancellor nevertheless has confirmed the partition made as aforesaid, with the following alteration ;— in lieu of the lands sold to *Semple*, and which had been allotted to *Charles Carter*, he has decreed to the said *Charles Carter's* representatives the purchase money which *Robert Carter* had received therefor, with interest thereon.

The first question to be decided is, whether the partition, as thus modified, shall be established ?

The question should be considered, as if *Robert Carter* were now alive and before this court ; and it will be much simplified by recollecting that *all the other parties assent to the partition, as made by the final decree* ; and of course, that it will not be disturbed, unless it be shewn to be improper, in relation to *him* ; nor will it be sufficient even for *him* or his representatives to shew that some other mode of division might originally have been more regular ; for the petition having been so long acquiesced in, and acted on by all others, he will not now be permitted to impeach it, but on the ground of its being unjust or illegal.

The company having agreed to sanction the sale of the land which *Robert Carter* had made to *Semple*, they had a right to consider as *their's* the money which he had received for the land; and being the proceeds of the sale thereof, they had a right to consider it, in the division, as *land*; and to allot it, accordingly, to one, or to divide it among all the partners. The substitution of the money for land cannot be unjust or illegal, as to *him* by whose act the substitution became necessary;—and cannot therefore afford any just ground for objection to the partition. The court perceives no impropriety in the allowance of interest on the price of the land. But if it were disposed to doubt its propriety, on general principles, the conduct of *Robert Carter* would remove that doubt,—for, in the very exception on which his counsel so much relies, he expressly declares his willingness to account for the interest.

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The interest is not to be regarded as profits on land, but, when added to the principal, is to be regarded as representing and substituting the value of *Semple's* land in the partition. Considered in this view, the partition could be objected to, on the ground of inequality *only*. The only evidence on this point is that furnished by *Robert Carter* himself; that lot, or portion, to which this money with its interest was attached, and of which it constituted a part, was offered to him; but he rejected it, on the sole ground of its being of *inferior value*: When, therefore, it has been assigned to another, who receives it without objection, it would not be permitted to *Robert Carter* to say that it was of *too great value*.

A partition which is thus just and proper, in relation to all the partners of the company, not excepting even *Robert Carter* himself, cannot be set aside by considerations which relate to a contest, between *his* representatives only.

That contest is as to the fund out of which the money decreed against *Robert Carter's* estate shall be paid. His son and executor *George Carter*, who is also the residuary legatee, insists that it should be charged on all the real estate of the said *Robert Carter*, in Virginia; or that, if it be not so chargeable, it ought to fall, at least, on his interest in the lands of the *Frying-pan* company. The first position can prevail only on the idea of the validity of the contract, to that effect, between *Robert Carter* and his children, as contended for by the

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counsel of the appellant. But that was merely a plan *proposed* for the division of *Robert Carter's* lands in Virginia, which was never carried into a contract. A Mr. *Queenlain*, who married a daughter of *Robert Carter*, after that plan had been proposed, and after she had signed a paper purporting to be an acceptance of that plan, laid claim to that portion which was to have been allotted to her, and forbade a division of it among her children, as wished by *Robert Carter*. In a letter from *Robert Carter* to his son, the present appellant, shortly before his death, and in direct reference to this controversy with *Queenlain*, he gives a detailed account of all the proceedings in relation to the proposed plan, for the purpose of shewing that it was never executed. He expressly says that the plan was rejected by *him*, and that neither Mr. *Maud*, nor any other person, ever proposed a second. It is very evident also, from another circumstance, that he never considered the proposed plan, as having been carried into a contract :— The plan proposed contemplated the Frying-pan lands, whereas the plan executed expressly excludes them :—moreover, instead of a *joint bond and mortgage* (as contemplated by the plan proposed,) that adopted was to convey the property by deed, subject to such provisions and conditions *only*, as the deeds contained ; among which, *the payment of debts is not to be found*. The claim of the appellant, therefore, so far as it depends on this alleged contract, falls to the ground.

Nor does the court perceive any reason for charging this money on *Robert Carter's* portion of the company lands. These lands passed by his will, which intimates no intention thus to charge them.

This money is, *as to Robert Carter*, a debt due to the company ; and the personal estate, when competent to the purpose, is the proper fund for the payment of debts. In addition to which, the personal estate is, by this will, *expressly charged with such payment*.

But the court considering that the appellees ought not to be relieved in *equity*, but on the terms of their acquiescing in the leases, and agreements of lease made by *Robert Carter* before the 26th day of January, 1778, the date of his letter to *Mann Page* and others ; (especially, as they claim a share of the rents arising from such leases and agreements ;) is of opinion, that

the several parties should hold the lands severally allotted to them, subject respectively to all such leases, or agreements of lease, as they would be subject to, if they had been the sole property of *Robert Carter* : and that liberty should be reserved to the defendants, representatives of *Robert Carter*, to resort to the chancellor for specific execution, if the tenants, or persons claiming under such agreements, shall proceed against them, or either of them, for damages out of the estate of *Robert Carter*, on such agreements.

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The court therefore reverses so much of the decree of the chancellor as contravenes this opinion, and, affirming the residue, remands the cause to be finally proceeded in, according to the principles hereby declared.

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UPON an appeal from a decree of the superior court of chancery holden at *Staunton*.

This case was argued, with very great ability, and at uncommon length, no less than three times, in this court, (viz., in October, 1807, May, 1810, and January, 1812,) by the Attorney General, *Hay*, and *Wirt* for the appellant, and by *Henry St. George Tucker*, *Wickham*, and *Randolph* for the appellees; but is so fully stated and discussed in the following opinions of the judges, that a needful attention to brevity compels the reporter to omit, with particular regret, the arguments of counsel, as well as any state of the case on his part.

On the 30th of March, 1816, (the court being equally divided,) the judges delivered their opinions *seriatim*.

Judge COALTER. The bill filed in this case, for the commonwealth, on the relation of *Charles Mynn Thurston*, escheator of the county of *Frederick*, charges, that *Thomas Bryan Martin*, formerly of that county, died possessed of a large real and personal estate, which real estate consisted of lands in posses-

1. A testator devised his real estate in Virginia, to his executors, to be sold by them, or the survivor of them, at such time, and in such manner, as they, or the survivor of them, should judge most advantageous; and gave and bequeathed the money arising from such sales, and the rents and profits of the said lands, which might accrue before the sales, to his sisters, who were aliens; subject, nevertheless, to the payment of his just debts, and of certain legacies to his executors. *Quære*,

whether, under this will, the title of the alien sisters was good against the commonwealth claiming the money for which the lands were sold; the testator having died without any lawful heir, and his personal estate being sufficient to pay his debts?

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sion and reversion ; that, prior to his death, *knowing* that he had no relations in this country, but that they were all aliens, and *incapable of inheriting his said real estate in the event of his dying intestate*, he consulted with eminent lawyers to ascertain how he might *most effectually* secure his estates to his three sisters, who were and still remain British subjects, and *who have never been within the limits of this commonwealth* ; that, in order to effect this intention of *devising his said estate to his sisters*, he made his will, in which, after other devises and bequests, is the following clause ; “ I give and devise all the rest of my real estate, in possession, reversion and remainder, in the commonwealth of *Virginia*, and also the aforesaid one thousand acres of land, if *Betsy Powers* aforesaid, does not survive me, unto *Gabriel Jones*, of *Rockingham*, *Robert Mackey*, of *Winchester*, and *John S. Woodcock*, of *Frederick*, gentlemen, to be sold by them, or the survivors, or survivor of them, at such time, in such parcels, and in such manner, as they, or the survivors or survivor of them, shall judge most advantageous ; and the money arising from such sales, and the rents and profits of the said lands, which may accrue before the sales, I give and bequeath to my sisters herein after named ; that is to say, *Frances*, *Sybilla*, and *Anne Susanna Martin*, to be equally divided between them, if alive at the time of my death, and if either be then dead, to the survivor then alive ; subject, nevertheless, to the payment of my just debts, and of the legacies bequeathed to my executors as aforesaid.” And, by another clause of said will, he bequeathed as follows : “ I give and devise the sum of fifty guineas to each of my executors herein after named, to be paid out of the property devised to be sold ;” and that by his said will, he directed all his estates, real and personal, except the 1000 acres bequeathed to *Betsy Powers*, and except, also, his watch and his plate, to be sold by his executors. The bill then charges, that *Mackey* and *Woodcock* qualified as executors ; and that the personal estate which came to their hands, exclusive of legacies, will far exceed the debts due from the estate ; that, although it appears to have been the *intention* of the said *Martin* to *evade the commonwealth's right by escheat, had he died intestate*, that yet, from the whole structure of the will, a trust is created, of which trust the commonwealth asks the execution in its favour ; that

the executors, though notified of the claim of the commonwealth, have sold the greater part, if not the whole, of the lands, contending that the same were devised to them in fee, and express an intention to remit the proceeds to the alien sisters of said *Martin*.

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The bill then prays a discovery, &c., and an execution of the trusts in favour of the commonwealth, and general relief, &c. To this bill the executors demurred;—after overruling, and again re-instating which demurrer, the chancellor at *Stamton* finally dismissed the bill.

When the demurrer was reinstated, it was conceded by the attorney for the commonwealth, that he did not seek to disturb the purchasers of the lands; but that the object of the suit was to recover the monies for which the lands were sold; whereupon, the court authorized the executors to proceed to collect said monies, and to hold them subject to its future order.

The question thus presented to us, in which the rights and interests of the commonwealth on the one side, and of alien claimants (under the will of a brother) on the other, come in collision, is one of peculiar interest, delicacy and importance; and is one in which the court will have no inclination to interfere, to the prejudice of the aliens, unless impelled thereto by the requisitions of the law, bottomed on that principle of self-preservation inherent as well in society as individuals; that principle which prohibits an alien from holding the soil and territory of our country, to which he holds no reciprocal allegiance.

The importance to society of that power which is given to individuals of appointing the future heir of their earthly possessions, seems to be universally admitted. Those affections which are so necessary to unite and preserve the human family in a state of civilization, and those exertions, whether bodily or mental, which tend to the convenience, comfort and ornament of society, depend much on the power of appointing who shall enjoy the fruits of those exertions after the death of the present possessor. To impair this power, therefore, is to lessen the motives to industry, frugality, and every social virtue, and in fact to diminish those endearing affections which so

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vitality interest as well the happiness as the existence of the social state.

Hence it happens that all wise governments have carefully preserved to individuals the right of perpetuating to their friends those enjoyments which they have toiled to acquire for themselves ; and are solicitous, by law, to cast the inheritance, where the proprietor dies intestate, on those supposed to be most dear to him. No government has gone farther than ours, in hunting out these objects, being desirous to succeed only where none such can be found, and not to step in before any, wherever they may reside, except to prevent the acquisition, by aliens, of the soil of our country. Nay, even as to these, the government has evinced a policy highly magnanimous and liberal, not only by the general law of descents, which provides, that in making title by descent, it shall be no bar to a party that any ancestor, through whom he derives his descent from the intestate, is or hath been an alien, but by surrendering the rights of the state, in many cases, to such as were aliens at the time of the descent or devise, on their becoming citizens ; as is manifested by many private acts of assembly for that purpose ; thereby evincing that the principle of self-preservation, not the enriching of her treasury, is the sound policy of the state.

The society then imposes no restraint on her citizens as to the final disposition of their acquisitions, provided it is done in a way not to endanger the community ; the next of kin, whether alien or citizen, will succeed, as distributee, to the personal estate, or will take it as legatee ; and the question in this case is whether, under the will above recited, the real estate, the soil of the country, passed to aliens, or merely a personal bequest ?

The bill admits that the testator knew they could not take it as real estate, and that he took advice how he might safely gratify his friendship for them without depriving himself of a home during his life, or violating the above principle of our policy and laws. He might have sold his real estate to a citizen, might have taken a mortgage on it to secure the purchase money, which he might have bequeathed to his sisters. This would have occasioned no injury to the state. He wishes, though, to enjoy it during his life, and that the same thing

should be done, by his executors, after his death, which he might thus have done in his life time ; and therefore he devises the fee to his executors, who were citizens, with power and directions to make such sale, and to pay over the money.

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Was such act and intention wrong, or injurious to society ? This devise vested the fee in citizens, who became tenants of the freehold, as purchasers, the descent being broken by the devise. The executors sell to other citizens, who become tenants of the freehold, receive the purchase money, and are about to remit it to the alien legatees, when the commonwealth steps in to claim it. They are, with good faith, performing the will of the testator, according to his intentions ; but the commonwealth says, there is another way of executing this will, or, rather, there is a principle of equity applicable to legacies of this description, which, though it will violate the clear intention of the testator, and rests also on the election of the legatees, which they have not made, and which they cannot now make, as the lands are sold, yet, as it is said they could have made it, and by doing so have defeated their own rights, and given title to the commonwealth, the intention of the testator must yield to this principle. This alleged *power of suicide* must be considered, by a *court of equity too*, as an *act of that kind*, and so this estate be vested in the commonwealth.

What is this principle of equity, which is to overturn the great and leading doctrine, in regard to wills, that they shall be expounded and carried into effect in that way which will best affect the intentions of the testator ; and which, to enable the commonwealth to claim in this case, must also proceed on the supposition that that which ought not to be done, and which, in this case, cannot now be done, has been done.

In the case of *Fletcher v. Ashburner*, (a) and various other cases, (b) it is said, that nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted ; and this, in whatever manner the direction is given ; whether by will, by contract, marriage article, or otherwise. The owner of the fund may make land money, or money land. The cases establish this rule universally. If any difficulty has arisen, it has arisen from

(a) 1 Bro. Ch. cases, 449.
(b) See *Trelawney v. Booth*, 2 Atk. 307.

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(a) *Fonbl. book*
1, ch. 8, sect. 9,
notes (t) and
(v); *Walker v.*
Denne, 2 *Ves.*
jr. 176; and
Doughty v.
Bull, 2 *P.*
Wms. 320.

(b) 1 *Fonbl.*
422; 2 *Ves. jr.*
170.

(c) 1 *Fonbl.* 419,
note (e).

(d) 1 *Wm. Bl.*
Rep. 129.

(e) *Bradish v.*
Ges, *Ambl.* 229;
Earlom v.
Saunders, *ibid.*
242.

(f) *Walker v.*
Denne 2 *Ves. jr.*
176.

(g) *Ackroyd v.*
Smithson, 1 *Bro.*
Ch. Rep. 500.

(h) *Short v.*
Wood, 1 *P.*
Wms. 470;
Yales v. Comp-
ton, *ibid.* 310;
Doughty v.
Bull, *ibid.* 320;
Trelanney v.
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special circumstances, as in cases where lands have been directed to be sold, and some part of the disposition has failed, *so that something has resulted to the heir at law*. It is, also, an established principle, that, if the party having such fund dies, it will go to his real or personal representatives, as money or land, according as he himself would have taken it; (a) but this rule of considering money as land, or land as money, will not apply if the special purpose for which the conversion is to be made fail; *neither does it apply if the effect would operate an est cheat*. (b) All this proceeds on the principle that equity looks upon things agreed to be done, as actually performed; (c) but it is to be remarked, that nothing is looked upon in equity as done, but what ought to be done; nor will equity consider things in that light in favour of every body, but only for *those* who had a right to pray it might be done. (d) These I understand to be the general and established doctrines. A further rule in equity has been also adopted, and engrafted on these, and which was intended to promote the benefit and convenience of the *cestui que trust*; which is this:—that, where money is directed to be turned into land, or *vice versa*, the person *entitled to it* may elect in which way he will take it, as money, or land; (e) and very slight evidence of his intention, *by acts done*, will be sufficient; (f) and when he has once signified that intention, he is bound by it. An infant, however, cannot elect; or, where an estate is directed to be sold, and the money divided amongst several persons, none has a right to say that any part shall not be sold. (g) So, too, where it appears to have been the intention that a sale or purchase, as the case may be, *must take place at all events*, there a court of equity, whose business it is to aid the intent of the party, will not permit the character thus impressed on the property to be changed by election. (h)

It is contended, on the part of the commonwealth, in this case, that the legatees, according to these principles, had a right to unite in electing to hold this land, as real estate; and that their *capacity* to do so, although they have made no such election, makes the will operate as a conveyance to them of an equitable title to real estate, which, as aliens, they are incapable of holding, and in consequence of which, the commonwealth takes the trust. And, though a sale has actually taken place

in this case, and the land is converted into money, yet that circumstance will not vary the rights of the commonwealth. And the case of *Roper v. Radcliffe*, is mainly relied on to establish this pretension.

That case was decided on the British statute which disables papists from purchasing lands, and which declares that all and singular *estates*, terms, and *any other interests or profits whatsoever*, out of lands, to be made, suffered or done to, or for the use or behoof of any such person or persons, or upon any *trust or confidence*, mediately or immediately, to or for the *benefit or relief* of any such person, shall be *utterly void, &c.*

John Roper, having lands in fee, conveyed them by deed to *William Constable*, and others, in trust to sell, and, out of the purchase money, and rents 'till sale, to pay off certain debts and incumbrances, and the overplus to be paid as the said *Roper*, by any attested writing, or by will, should appoint. *Roper* then had an interest in this land still left in him, which, had he died intestate, or without making any appointment thereof by deed, would have descended to his heir at law as a resulting trust; as a real trust interest descendible. He, however, made a will, by which, after reciting the deed and the power in him over the surplus, he bequeaths several pecuniary legacies, and the residue of all his *real and personal* estate he gave to *William Constable* and *Thomas Radcliffe*, who were papists. They bring their bill against *Edward Roper*, the heir at law of *John Roper*, the testator, and the trustees, to have the trust estate sold, &c. *Edward Roper*, the defendant, contended that, as heir at law, he was entitled, *Radcliffe* and *Constable* being papists, and incapable of purchasing; and that the devise was therefore void. The lord chancellor, assisted by other judges, decided that the devise of the surplus, after debts and legacies, was good, notwithstanding the act; the surplus money being a *personal* interest in them, and not made void, either by the words or intention of the statute. *Roper* appealed to the house of lords, where the decree was reversed principally for the reason that, *if the devise of the residue to the plaintiffs was good*, they would in equity, be entitled to pay off the debts and legacies, and, when that was done, keep the estate, which would be a means of evading the statute, and enabling a papist to take an estate contrary to the intention of it. (a) It will be

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(a) 5 Bac. 278.
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found by a full examination of this case, and of the reasoning of the lord chief justice *Parker*, (whose opinion is the only one given at large,) as reported in 9 *Mod.* 181., that the strong and comprehensive words of the statute had great weight; "*all estates, terms, and any other interest or profit whatever out of lands,*" &c.—And, the lands not having been *then turned into money*, the question *now* is, says he, whether this trust, this right to the surplus, be within the act; that is, whether it be an hereditament, estate, or any interest or profit *whatever* out of land. He proceeds to say, had this even not been a surplus, but a certain sum appointed to be paid out of these lands, it would have been an *interest and profit out of land*, and so *clearly* within the act. Such an interest as this latter, though, it is admitted would pass to an *alien*, and now, by late opinions, would go also to a papist. But he proceeds, farther, to say, that this residue, remaining in *John Roper*, was so vested in him by the deed, as not only to be an interest and profit out of land, but such an one as was an hereditament and descendible to his heirs, it being expressly reserved to him and his heirs, and would clearly go to *Edward Roper*, the heir at law, if the will was out of the way; *that it is a resulting trust in the heir*, and, if not devised away, would have been assets by descent in his hands; and that a devise of all his personal estate would not have passed this interest; but that it passes to the plaintiffs, if the devise is not void, as the *residue of his real estate*, in which case they would take a *trust in the land*, 1st, as it was in *John Roper*, and 2d, as it would have been in his heir: and therefore it was, 1st, an hereditament; and 2d, a *descendible trust in land*. He then goes on to refute the arguments as to its being a descendible interest, and *admitting it was not, which he denies*, he still urges that it would be within the act; otherwise, it might be evaded: and I understand his opinion on this point, to be substantially this, that, *if it is no purchase against the act*, then a papist who can hold land in any way not prohibited by law, would take an interest in land, and after the court has declared the trust good to him, it would be too late to dispute with him about the management of what is his own.

This decision is considered as law, in England, as to papists, merely because it has been so decided by the highest tribunal,

not because the decision is satisfactory ; but no judge is disposed to carry the doctrine an iota farther. If, then, there is a manifest difference between an alien and a papist, as to their abilities and disabilities, and also strong points of difference between that case and the present, I see no reason why this decision should be extended so as to embrace the controversy before us.

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In the first place, then, there is this distinction between a papist and aliens. The former is a subject, and can hold lands in any way not prohibited by law. He can transmit them, forfeit them by treason, &c. ; and if a devise of this kind to him is *not void*, he would come into a court of chancery to be permitted there to hold them by election, and so the policy of the statute might be evaded, as the mortmain acts had been evaded by suits and covinous recoveries, which the courts, presuming all recoveries just and lawful, would not construe within the law, and so the statute was evaded.

A devise, though to an *alien* is not *void*. The commonwealth does not come here on that ground. His election, if he could make one, to hold them as land, would, *ipso facto*, convert the bequest into land, which he then could not hold, (as the papist could, if the devise was not void,) but he would then take for the commonwealth, as he would were he voluntarily to lay out his money in a purchase of land. The election of of the papist to hold as land will not give it to the heir at law, because that would be to make the devise enure, in a certain event, to him. The devise is either void, or not. If not, and the court so decides, it may then be too late to say to the papist, you shall not use as you please what is your own.

There is also a striking difference between these cases. In the case before us, the land has actually been converted into money, and that money alone is the subject of controversy. Now, if lands are charged with the payment of monies and more than enough happens to be sold, there is no head of equity, as between the heir and personal representative, to consider this surplus of money as land, in which condition it ought to have remained, but they must take their rights as they find them. Why should not this principle also apply to the commonwealth ? In this case too there is no resulting trust in these alien legatees, or descendible trust interest. Had

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they, or either of them died, the day after the death of the testator, the bequest would have gone to the personal representative, not to the heir at law of such deceased party. Had they all been dead at the death of *Martin*, the legacies having lapsed, then, indeed, there would have been a resulting trust, descending on the heir of *Martin*, as to this residuum; but these parties clearly took a personal interest, and which would have gone to their personal representatives.

This case of *Roper v. Radcliffe* came under consideration in the case of *Foone v. Blount, Corp.* 467. Lord Mansfield says, concerning it, that, "being a decision of the house of lords, we must be bound by it; though the judgment was against great opinions, and not with the approbation of the bar; and, though it must govern parallel cases, yet, being so little satisfactory, it ought not to be carried farther. The argument of lord chief justice *Parker*, (he says,) is very able, but not convincing to him. He says, if such devise is not within the acts, the devisee might make his election to pay off the debts and keep the land, by which means the statute would be evaded;" but the defect of the argument lies here, and the objection may be answered thus:—no;—a Roman catholic shall not make his election; because there is a law which says that, "being a papist, he shall not take the land." "Something of this kind," he observes, "was said in *Bones v. Lord Shrewsbury*." (a) So he says, "in the common cases, where money is given to a charity to be laid out in land, or government security, though a common person may, in a like case, elect to take the land, the charity cannot; because it is unlawful; and therefore, though the election be given, yet, one alternative being lawful, and the other not, a court of equity says, 'you shall do that which is lawful.' If, however, chief justice *Parker* is right in saying it will be too late, after declaring the devise good, to say, in case of a papist who could not forfeit it by such act of election, that he shall not elect, yet the case is different as to an alien. If his act of election would, *ipso facto*, forfeit his estate, ought a court of equity to permit such act to be done, unless, indeed, they were fully satisfied that the party was in his right senses, and was fully advised of the consequences of such his act; as, *prima facie*, it would be the act of a lunatic, against which that court ought to guard him? In

(a) 5 Bro. Parl. cases, 269.

this point of view, I think an alien ought not to be considered as having an election. The election given to a citizen is adopted on the principle of extending a substantial benefit to him:—why will equity suppose this power in an alien, not as a benefit to him, but merely for the purpose of forfeiting his estate; and that, too, without even giving him the election to take it in the way he can,—as money, not land? Why throw this power upon him, if he has no right to exercise it for his benefit? It is no power of *election*, if he can elect but *one* way. If a citizen dies, leaving no heirs but aliens, the law does not throw the inheritance on them, in order that the commonwealth may take it from them; because the law will do nothing in vain. The commonwealth, in that case, takes, as though these heirs were not in being. Why then shall equity do so vain a thing, as to convert an useful principle of equity, as *cestuy que trusts* generally, into an engine of destruction as to *alien cestuy que trusts*, by supposing an election in them, which they are not permitted to exercise? If they are supposed to have the right of election, surely they ought to be permitted to elect at their peril; and, if so, the election in this case is past, as the lands have been sold, and the only question is about the money.

It is said, this right of election has become a rule of property; but I rather consider it a rule of equity, not affecting the nature of the estate, but founded in the convenience of the parties. Why encounter the expense and trouble of a sale, and oblige the *cestuy que trust*, if he wishes to hold the land, to purchase it in? It was to avoid this circuitry that courts of equity permitted him at once, to elect to hold it as land, on paying off the charges upon it. If it is a rule of property, though, I apprehend it ought to fix the character of the estate from the death of the testator. But an infant *cestuy que trust* cannot elect, or, if he does, his election is void, and the property goes, as land or money, according to the stamp which is placed upon it by the will or agreement. It remains personal in this case, until the time of election. Suppose a legatee of this kind had died intestate, the day after the testator, leaving a husband, and a child or children. The husband, as her personal representative, would take this bequest as personality; but, having thus acquired a right to the money, he then comes

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in and elects to pay debts, &c. and keep the land; and, if there is no objection to him as an alien, I see no reason why he should not be permitted to do so:—it *then, and not 'till then*, becomes land, and that after having passed, in the first instance, as personalty. But, suppose money is directed to be laid out in land, in Virginia generally, or in a particular tract, and devised to an alien. This, in case of a citizen, before election to take it as money, would be a real trust interest descendible to his heirs. Would a court of equity restrain the alien from electing to take this as money, or compel the trustee, notwithstanding such election, to lay it out in land, so that the commonwealth might take it? Or would she take the money as land? According to the principles of the case of *Walker v. Denne*, 2 *Vesey, jr.* 170, I think a court of equity would not be justified in doing so, or in giving the money to the commonwealth; indeed, the rule which I have above referred to, says that this shall not be considered as land, if that would operate an escheat.(a) Why then will it convert a mere personal trust interest into land, for the benefit of the commonwealth, and make it that which it was not originally, merely for the purpose of escheating it?

(a) 1 *Fosbl.* 422.
note (v).

In the case of *Hart v. Knot, Comp.* 43, the testator devised as follows:—"In case my personal estate shall not be sufficient to pay all my debts, legacies, &c. I hereby give to *M. K.* and *W. R.* and their heirs, all my lands and estates at Alderchurch, upon trust to sell the same, &c. and the money arising to go and be applied towards making good any such deficiency;" and, after subjecting lands in reversion to the same purpose should the lands so devised also prove deficient, he concludes; "and, lastly, all the rest and residue of my real and personal estate whatever, I give to my wife, and her heirs," &c.

All the debts and legacies were paid out of the personal estate; and so no occasion to call in the land. The question was whether *Hart* the heir at law was entitled to recover the land at Alderchurch from the widow.

It was contended he was, because the testator did not intend to comprise these lands in the residuary clause, they being devised to the trustees.

Lord Mansfield says; "There are two lights in which it may be considered. First, whether, in the event which happened, there is any devise of the premises? If not, they go, by the residuary clause, to the widow." And he was of opinion, "they were not devised to the trustees, for the testator says, in case my personal estate is deficient, then I devise, &c. But his personal estate was more than sufficient; therefore, he did not devise." "Secondly, he supposes the personal estate a little deficient, in which case, he says, the devise would have taken effect, and then there would have been a *resulting trust* for some body, and, if the trustees had paid this charge, they would have become trustees for the person entitled to the surplus; and he admits that, if that person was the heir at law, the mere legal estate in the trustees, for his benefit should not be set up by the widow against him;" and so he would be entitled to recover. "But whether he should be considered the *cestui que trust*, or not, turns singly on the construction of the will. It is a trust originally, and, in substance, a charge on land, which is devised, subject to raise by sale or mortgage as much money as may be wanted. It is therefore, in substance and equity, a devise of a charge upon the estate, which may be discharged by payment of the incumbrance, or, if not wanted, will rest in the same state as if it had not been made subject to such incumbrance; and the words, 'all the rest of the land,' necessarily make it come within the residuary clause. If it had been sold, the residue of the money must go to the person to whom, under the residuary clause, the land itself was to go, subject to such payment; therefore in either case the widow was entitled."

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The real case decided, then, was that the residuary devisee took this land;—the devise to the trustees, under the event which happened, never having taken effect in them. The case supposed though, and which might have happened, to wit, there being a balance of debts and legacies to pay, lord Mansfield says would turn on the construction of the will, according to which he says he would have considered it a devise of the land to her charged with this balance.

If this is to be considered a decision on the doctrine of elections, and to extend beyond that case, (which was a real trust

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descendible to the heir as a resulting trust, or going to the residuary devisee as land,) to the case of the will before us; it would result in this; that, whenever lands are devised to executors or trustees to be sold, the legatee of the residuum shall be considered a devisee of the land itself before election, and immediately on the death of the testator, and in case of the infancy, or on the death of such legatee, before election, it would descend as land, which would be contrary to all the authorities above referred to: for if, before election, it is an equitable interest in the fee simple, then, on the death of the legatee without any act of election, it would go to his real representative; but all the authorities are against this:—it will only go to the real representative in consequence of some act evincing an election to take it as land. But, farther, if it should be considered as extending to these cases, and converting them into devises of *land*, it would also seem to follow that, the aliens taking *land* by this devise, the commonwealth ought to have pursued her usual remedy by office of escheat at law, and should not have come into equity. This broad doctrine, therefore, I do not consider tenable.

According to the general rule, an election exists; but a general rule, to be good, must have exceptions: this one has its exceptions: an infant cannot elect. So, if there are *several* legatees of a surplus, as in this case, no *one* can elect: he can only procure the others to join him in the election; and if that cannot be procured, he has no election, even if a citizen; so that, before this sale, no *one* of these parties had an absolute right to elect. Why not say too, that an alien legatee shall not be considered as having an election? To deny to him this right of election would be to support the principle of the rule which was adopted for the benefit of the *cestuy que trust*: for, if to suppose the election in him is to defeat a bequest in his favour, and contravene the intention of the testator, and in fact contravene the principles of the rule itself, why make such supposition?

Before the doctrine of election was acted upon by the chancery courts, the course, I presume, was for the trustee to sell, and *cestuy que trust*, if he wanted the land, to purchase, pay the other incumbrances, and hold it in lieu of the residue of the purchase money. Had an alien *cestuy que trust* purchased,

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he would have taken for the crown, and, knowing this, he would not interfere, but claim the residue as money. But, when this principle was first acted upon, let us suppose three cases before the court; that of a subject claiming to elect; that of a papist claiming the execution of the trust repelled by the heir, who contends that this principle avoids the devise; and the case of the crown demanding an execution of the trust in favour of an alien to be made in its favour: what course would the conscience of a court of equity pursue?

The court, thus circumstanced, may be supposed to say; as to the subject, this may be a beneficial rule of equity, and ought to be adopted as a general rule; but we must see how it is to operate on these other cases. This principle, it is true, has always existed in the nature and propriety of things; but its propriety, as applicable to the nature of things, may not admit of its being an universal rule. At present, and according to the rule as hitherto understood, the papist and the alien can take this as money: shall we adopt the rule generally, so as to consider them as purchasers of an interest in or equitable title to real estate? Or shall we say, that this rule, which is founded on the convenience and interest of the *cestuy que trust*, shall not extend to them? If these cases were now for the first time to be decided, the interest of the papist, even in the case of a real trust descendible, would be protected on this ground, as appears by what is said, in recent adjudications, of the case of *Roper v. Radcliffe*; and had such decision taken place, it would have been an authority directly in favour of an alien, who, *a fortiori*, ought not to be permitted to elect; whilst, at the same time, it would in no manner conflict with the decisions which, it is said, establish an interest in lands where the election exists, as, without such right of election, it is admitted no interest would exist. But say, that, as to the papist, the court at that day were divided; some judges thinking that he ought to be protected by denying him the right to elect, others thinking that, as he is a subject, and capable of holding lands in any way not prohibited by positive law, he might lay hold of this principle to evade the statute, for if the devise is not declared void, his posterior act of election will not make it so; yet, as that was not the case as it respected an alien, whose election, when evinced by any slight act, as inter-

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fering with tenants, taking possession of the land, &c., would *ipso facto* forfeit his estate, it would be time enough for the crown to claim when such election was made: or, (what I think would be the more liberal and reasonable ground of decision as to him,) the court might well say that, as the devise or bequest is in no event to be declared void, we will not suppose him to have an election to take what he cannot hold, as such supposition would contravene the very principle on which we are about to establish the rule, and is not forced upon us by the consideration that he may lay hold of it so as to evade the law imposing a disability on him to hold: he therefore will form a proper exception to the rule.

(a) *Ambt.* 11.

We might well doubt as to the propriety of the decision in the case of the papist, as applying the rule in a hard and unreasonable way as to him, but not as to the alien; there being a clear difference between the two cases; "and judges, (says lord Hobart,) (a) ought to be *astuti* in finding out reasonable "distinctions to unreasonable rules." But why should we carry the case of *Roper v. Radcliffe* beyond the very point then decided, when it is admitted that the bigotry of the day carried the judges too far even as to papists? That was the case of a real descendible trust interest, and admitted by lord chief justice Pratt to be much stronger than the case of a personal trust interest which this is? His *dicta* and reasoning as to a certain sum to be raised by the sale of land have been since overruled; and why ought his reasoning and dicta as to personal trusts to prevail? The policy of the state gives encouragement to aliens, who are permitted to purchase land warrants and survey lands, and are allowed two years either to become citizens, or to transfer the surveys. This boon is held out by the State to tempt foreigners to fill up our wilderness.

I have heard of no case within this commonwealth, or in any of the other States, of an escheat of a lease for years to an alien of arable land for cultivation, although I believe such leases are not unfrequent. Whether the courts would consider the common law of England, a country surcharged with inhabitants, and far from soliciting emigrations to it, as applicable, in this respect, to one remaining, even at this day, principally in forests, every where soliciting the ax of the labourer, the plough of the agriculturalist, and the ingenuity of the artisan,

or would restrain these and like privileges to *land-jobbers* and mercantile adventurers,—characters,—to say the least,—not more useful to the State,—may perhaps be a question worthy of consideration, should the commonwealth ever attempt to throw this obstruction in the way of the improvement of our soil and manufactures.

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But the greatest interest in land which, I apprehend, it can be supposed a party, whether alien or citizen, takes, under a bequest of this kind, *before election*, is an equitable interest in land, of so slight a texture that it can be defeated, by the executor or trustee, at any moment, without even the notice necessary to a tenant at will,—an interest not in possession, the fee, with the possession and right of possession, being in others.

Before election, as is above observed, his interest in the land is not of such a nature as to pass to his real representative, as it would do *after election* made. It is a mere *power* to make it land, or let it remain money; and, if he dies before exercising this power, its character is unchanged. This power, however, if it has been considered, either at law or in equity, as giving any interest in the land itself, will be found, I believe, to have been so considered, (the case of the papist excepted,) for purposes beneficial to the *cestuy que trust*, and in no case for the purpose of working an escheat, or for any other purpose injurious to him. The nature or character of this interest, however, appears not to be well understood or defined. It cannot be an equitable fee, until after election. It is not a lease for years; otherwise it would go to the personal representative as a chattel real, whereas he takes it as money. The commonwealth, though, does not ask to take it as a chattel real, but as an equitable fee in the hands of the *haeres factus*, who it is alleged cannot hold it. But, if it is not an equitable fee in his hands, but merely a power to make it such, and which power in this case even no longer exists, why will the court make it what it is not, for the purpose of working a forfeiture?

Suppose a citizen wishes his real estate sold after his death, and that aliens shall have the money, and, for that purpose, devises it to his executors to be sold, and gives a sum certain, say ten times the estimated value of the property, if it shall sell for so much, to be equally divided among aliens, and then gives the residue to his executors. This bequest would be

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good on its face; but would it, in reality, be safer for the commonwealth than the present devise? The executors in the case supposed may never sell. They know that a residuum is out of the question. They manage the estate, therefore, for the *cestuy que trusts*; put tenants in and out according to their directions; and a thousand acts which would amount to an election, and forfeit the estate in the present case, would not do so in that. The policy of the law might be evaded in a case of that kind more easily than in this; yet that, it is admitted, would be a good bequest to an alien.

The case then, as well as the reasons to support it, must be so strong as not to be escaped from, before I can consent that this *shadow of a shade* of title to real property shall defeat a bequest, in its nature personal, until some *deliberate act* of the legatee shall make it more substantial. Nor do I see any difficulty at all, either as it respects the safety of the State, the justice of the case, or the authorities relied on in opposition, in declaring that an alien has no right of election in such cases. Let him purchase in the estate if he chooses to risk the consequences. Some such *deliberate act alone*, I think, ought, in this case, to subject him to the penalty arising from "that presumption of which he is supposed to be guilty," (to use the words of judge *Blackstone*.) (a) "in attempting, by an act of "his own, to acquire any real property."

(a) 2 Bl. Com.
273.

But there is another case of disability to elect, which it appears to me ought surely to embrace this case; which is that, if the testator intended that a sale should, at all events, take place, there is no election.

This intention must be collected from the will, which, I apprehend, is to be taken in connexion with the situation of the testator, the nature of the property devised, and the condition of the objects of his bounty. (b) The testator was a citizen of this commonwealth, possessed large real estates therein, which was the great object of the devise; and the legatees were his sisters, and aliens. The bill admits that he was apprized they could not take this estate AS LAND; and that he took advice how he might EFFECTUALLY secure it to them, so that they and not the commonwealth might have the benefit of it. If though, they could only take it as money, after a sale made by his executors, to whom he devised it in fee, and he intended they

(b) 1 Wash. 58.
*Shelton's execu-
tors v. Shelton.*

should take, it follows that he intended a sale should certainly take place. In the case of *Bowes v. Lord Shrewsbury*, (a) noticed by lord *Mansfield*, as above stated, a papist, by marriage articles, previous to the disabling acts, covenanted to lay out money in land : the money was not laid out until the statute was made :—the husband outlived the wife and all the children, and was sole survivor, and neither by deed, will, nor parol declaration, did any thing to vary the trust. Lord *Shrewsbury*, as his next of kin, took administration. *Bowes*, as his heir, claimed and filed a bill to have the benefit of the articles. But, as the statute put it out of the husband's power to make it land, this was considered equal to his assent that it should remain money ; and the bill was dismissed.

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(a) 5 Bro. Parl.
cases, 144.

It would swell this opinion, already much too long, to an improper and unnecessary length, to notice the other leading cases referred to on both sides. Suffice it to say, that I think them all reconcilable to the great principles for which I contend ; to wit, that the disposition of the testator's property by this will may be sustained without compromising the safety of the state ; and that it is the duty of courts, so far as they can consistently with that safety, and the rules of law, to give efficacy to such dispositions according to the intent of the parties ; having no right, if it can be avoided, to thwart or turn aside the bounty of testators.

There is one ground of claim, however, to wit, the devise of *rents*, which must be noticed.

This clause in the will must be considered, either as a devise to aliens of the land itself, or of some hereditament, in fee, or for life, years, or at will of the executors ; or it must be considered a devise of the lands to the executors, in trust, to hold the land itself, or some hereditament, for aliens, in fee, for life, years, or at will. If it conveyed the fee to the aliens, this clause would defeat the previous devise of the fee to the executors ; but the whole will must stand, if it can. In that case, too, the commonwealth would have no business in a court of equity, as it would be a plain case of a devise of lands, or hereditaments escheatable at law. But the commonwealth does not claim the land itself on this ground, nor does she say that any rents had accrued before the sale, so as to claim them now in a court of equity, on the ground that, the sale being

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now made, she is deprived of her legal remedy to be let in to the enjoyment of the land, and the perception of the rents until the sale, as an hereditament belonging to the alien until that time. The bill is entirely silent on this subject, and claims only to have the trust executed for the commonwealth where sales have not been made, and to have the proceeds of those that have been made; admitting, in fact, that the legal title did not pass to the aliens. As to the latter, I think the will cannot bear the construction, that it was intended to create a trust in the lands themselves, until sale, in favour of the aliens; but if it was so intended, still, if there is nothing to prevent the aliens taking the residuum after sale, the commonwealth, I apprehend, taking this trust under the will, could only claim the rents previous to the sale, not the whole value of the lands; for, suppose the rents, before sale, devised to aliens, and the surplus of sales to citizens, the commonwealth could only claim the part devised to the aliens, as an hereditament which they could not hold; but the devise of the surplus would be good.

In *Co. Litt.* 236 a., it is said that, where a man devises that his executors shall sell his lands, there the lands descend in the mean time to the heir; and, until sale, the heir may enter and take the profits; but where the lands are devised to the executor to be sold, there the devise taketh away the descent, and vesteth the estate of the land in the executor, and he may enter and take the profits, and make sale according to the devise. According to this authority, the executors had a right to receive the rents and profits until the sale, and then the whole value of the estate, whether arising from rents upon leases made by them, (which may be considered as sales for term of years,) (a) or from sales made of the fee, is first charged with the payment of debts, legacies, &c.; and the surplus, in one entire sum, is then given to the sisters. Had they attempted to make leases, or to distrain, they might have been opposed on the ground that they had nothing in the tenement.

Upon the whole, therefore, and from the best view I have been able to take of the case, I am of opinion that the decree should be affirmed.

(a) *Trafford v. Ashton*, 1 P. Wms. 418.

Judge CABELL. By the will of *Thomas B. Martin*, his alien sisters *Frances*, *Sybilla Martin*, and *Anne Susanna Martin* are made residuary legatees of the surplus (after payment of debts and legacies) of the money arising from the sale of his lands, which he devised to trustees to be sold, at such times, in such parcels, and in such manner as they might deem most advantageous. The will also gives to his said sisters the rents and profits which might accrue before the sale.

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The first question to be decided is, whether the *Miss Martins* took by this will any estate in the lands thereby devised; for, if the will gave them no estate in the lands, the commonwealth's claim to the money arising from their sale can have no foundation.

If the decisions of the English courts, in cases parallel to this, be admitted to be authority, I consider this a very plain question.

In the great case of *Roper v. Radcliffe*, 9 Mod. 167., it was expressly decided by the house of lords, that a devise like that under consideration gives to the residuary legatee an equitable estate in the lands themselves. In that case, as in this, it was contended for the legatees, "that lands devised for payment of debts and legacies are to be deemed as money." But to this the house of lords answered and resolved, "that though "lands devised for payment of debts and legacies are to be "deemed as money so far as there are debts and specific legacies to be paid, yet still the heir at law has an interest in "such lands, by a resulting trust, so far as they are of value "after the debts and legacies are paid; and the heir at law "may properly come into a court of equity, and restrain the "vendor from selling more of the lands than what are necessary to raise money sufficient to discharge the debts and legacies, and to enforce the decree to convey the residue to "him; which residue shall not be deemed as money, neither "shall it go to the executors of the testator. Nay, the heir at "law in such case may properly come into a court of equity, "and offer to pay all the debts and legacies, and pray a conveyance of the whole estate to him; for the devisee is only "a trustee for the testator to pay his debts and legacies. This "is a privilege which has been always allowed in equity to a "residuary legatee; for if he come into court, and tender what

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" will be sufficient to discharge all the debts and legacies, or
" pray that so much of the lands, and no more, may be sold,
" than what will raise money to discharge them, this is always
" decreed in his favour. Therefore, though lands given in
" trust, or devised for payment of debts and legacies, shall be
" deemed in equity as money, in respect of the creditors and
" legatees, yet it is not so in respect to the heir at law (of the
" testator,) or residuary legatee; for in those cases they shall
" be deemed in equity as lands."

This case has been very often referred to in subsequent adjudications; and its authority has never been questioned but uniformly acknowledged. As it is believed to have a decisive bearing upon the case now before the court, it is important to ascertain the point which it really settles. The object of inquiry was whether the residuary legatee in that case *took an estate in the lands*, and not whether the will gave him a *charge* on the lands, or a *benefit* resulting from them; for it was impossible that the decision should have been against the legatee, unless he was deemed to have taken *an estate, equitable or legal*, in the lands. It was not important to inquire whether the estate, which he took in the lands, was of such a character that, on his death, it would descend as *real estate* to his heirs, or be distributed as personal estate to his personal representatives; and we find accordingly that the house of lords said nothing as to the manner in which the interest of the *residuary legatee* would go after his death. An attention to the subsequent adjudications, in which this case of *Roper v. Radcliffe* has been referred to, will shew that it has never been considered as having decided any thing on this latter point, viz. whether the interest of the legatee should go to his real or personal representatives; but it has never been questioned that it conclusively determined that the residuary legatee took an *equitable estate* in the lands. The opinion of the lord chancellor in the case of the *Attorney General v. Lord Weymouth and others*, (a) fully justifies these remarks. The will there presented a case very much like this, so far at least as relates to the principle under discussion; and the chancellor, when speaking of the interest which the devisee took in the lands, says, " As to the devise of the money arising from the sale, I
" do not think it necessary, in order to determine this ques-

(a) *Ambli.* 20.

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" then, to say whether it is to be considered as a devise of the
" land or money ; but if the act of parliament did not stand
" in the way, the person entitled to the residue might have
" come, and prayed to have the land, in this court, instead
" of the money, and might have retained it as land ; and the
" rather as the testator has given the profits 'till sale, so that
" he has made them owners of the *equity of the estate* ; and
" therefore this is as strong a case as that of *Roper v. Rad-*
" *cliffe*." Many other cases might be referred to, as establish-
ing the same point. I will mention one other only, the case
of *the King v. Wivillingham*, (a) in which lord MANSFIELD, (a) *Doug.* 779.
who disapproved of the decision in *Roper v. Radcliffe*, (as
will be seen in his opinion in *Foone v. Blount*, (b) and who (b) *Comp.* 464.
therefore will not be supposed desirous to extend it beyond its
proper limits, nevertheless refers to *Roper v. Radcliffe* as estab-
lishing a general principle, " that a devisee of the surplus,
" arising from the sale of lands, after payment of debts and le-
" gacies, has an equitable interest in the lands themselves ; it
" being in his option to pay the debts and legacies and keep
" the lands." This opinion of lord MANSFIELD is very im-
portant, as it was uninfluenced by any consideration relating
to the statutes against papists, and against conveyances in
mortmain, but proceeds on principles of construction common
to all residuary legatees whatsoever. It is important, also, as
it shews, as all the other cases do, that the interest of the de-
visee in the lands is made to depend not on an election actual-
ly made by him to take the land, but on the *option*, which the
will itself gives, of taking either the land or money.

Having thus established that the residuary legatees took an
interest, an *estate*, in the lands themselves, I do not deem it at
all important to inquire whether that interest be of such a
character that, on their deaths, or the death of either of them,
it would go to the real or the personal representatives of the de-
ceased. The case of *Doughty v. Bull*, (c) (so confidently re- (c) 2 P. Wms.
lied on by the counsel for the appellees,) and others of the 320.
same class, are, in my opinion, perfectly correct, founded on
principles of equity, and not in conflict with any of the deci-
sions for which I contend. But they have no bearing upon
the case now to be decided. The rights and the disabilities
of aliens have no reference to the technical distinction be-

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tween *real* and *personal* estate. A term for years, an interest in lands which is distributed as *personal estate*, is forfeited if taken by an alien. A mortgage, even, of a term for years, which is *personal estate*, both at law and in equity, becomes forfeited, if executed to an alien. The case of a mortgage presents a strong view of this subject. It is merely intended as a security for a debt; and the usual practice is for the mortgager to remain in possession of the land; yet, because the mortgagee *may* sue at law and recover the possession, a mortgage made to an alien is forfeited to the commonwealth.

The policy of our law against conveyances to aliens, is not less strongly marked than is the policy of the English statutes against conveyances to papists, or in mortmain. The only difference is that, under the British statutes, the conveyances are void; whereas the conveyances to aliens are good, but enure to the benefit of the commonwealth only. There is no difference as to the principles of construction which should be applied for ascertaining the nature of the estates created by those conveyances of every description. I will add farther that, where the policy of the law is so strongly marked, judges should be astute to prevent its violation or evasion.—We should not, therefore, countenance devices like the present. In the words of the lord chancellor, in the case of the *Attorney General v. lord Weymouth and others*, before referred to, (substituting only the term alien for the term charity,) “here is a gift of the rents and profits ’till a sale; and how long it will be before a sale,—’till what time it will be postponed,—nobody knows:—no man has a right to compel the trustees to sell, if they pay the debts and legacies, but the “charity;” (alien;) “and it being a devise of the rents and “profits, it is a devise of the lands themselves.”—Persons owning lands in this country might thus, by adopting this form of devise, and selecting their confidential friends as trustees, ensure to aliens the actual enjoyment of the lands for a very long series of years, if not forever, in direct contravention of the policy of the law.

Upon the view of the case which I have thus taken, I am very clear that this will gave the *Miss Martins* an equitable fee simple in the lands; and that being a trust estate, the com-

monwealth was entitled to have it executed in her favour. (a) The sale of the lands in this case made no difference. The right of the commonwealth attached at the death of the testator, and cannot be defeated by subsequent acts of the legatees, or their agents. As well might it be contended that, if an alien purchase lands directly to himself, he may elude the claim of the commonwealth by a sale before office found.

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The commonwealth being entitled to the execution of the trust, she is entitled to the money arising from the sale made by the trustees, as she has consented to receive it.

(a) 1 Roll. 194;
Hardr. 495;
Danvers. 321—
2; 3 Ch. Rep.
20; and 1 Wm.
Bl. Rep. 160.

On these grounds, I am of opinion that the decree of the chancellor is erroneous, and ought to be reversed.

Judge ROANE. This is a bill brought by the attorney general, on behalf of the commonwealth, at the relation of the escheator of the county of *Frederick*, against the executors and devisees of *T. B. Martin*, deceased. It states in substance, that the said *T. B. Martin*, being possessed of a large real and personal estate, and knowing that *all* his relatives were aliens, and incapable of inheriting his real estate, consulted with eminent lawyers to ascertain how he might *secure* his *estate* to his sisters who were aliens:—that, in order to effectuate this intention, of devising his said estate to his said sisters, after giving to *Betsy Powers* 1000 acres of land, and some small legacies, he devised as follows:—"I give and devise all the rest of my real estate, in possession, reversion, and remainder, in the commonwealth of *Virginia*, and also the aforesaid 1000 acres of land, if *Betsy Powers* aforesaid does not survive me, unto *Gabriel Jones*, *Robert Mackey*, and *J. S. Woodcock*, to be sold by them, or the survivors or survivor of them, at such time, and in such parcels, and in such manner, as they or the survivors or survivor of them shall judge most advantageous, and the money arising from such sales, and the rents and profits of the said lands, which may accrue before the sales, I give and bequeath to my sisters herein before named; that is to say, *Frances*, *Sybill*, and *Anne Susanna Martin*, to be equally divided between them if alive at the time of my death; and if either of them be then dead, to the survivor then alive; subject, nevertheless, to the payment of my just debts, and of the legacies bequeathed to my executors as aforesaid." That, by another clause, he gave 50 guineas to each

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of his executors, to be paid out of the property devised to be sold : that by his will he directed all his real and personal estate, except the 1000 acres aforesaid, and his watch and plate, to be sold by *Jones, Woodcock, and Mackey*, whom he also appointed his executors :—that *Woodcock and Mackey* qualified as executors, and have proceeded in the execution thereof : that the *personal estate* which came to the hands of the executors *will far exceed the debts due from the estate* :—that it appears that *Martin's* object was to evade the commonwealth's rights of escheat ; and that, from the whole structure of the will, a trust is created, of which the commonwealth asks the execution in its favour : that the executors and trustees, though warned of the claim of the commonwealth by an actual inquiry of escheat, have sold a part if not the whole of the land, and express an intention to remit the proceeds to the devisees, the testator's sisters. The bill then demands a discovery of the property, and of its disposition, and prays that the executors be decreed to perform the trust in favour of the commonwealth, be enjoined from remitting the proceeds of the sales of the lands, and for farther relief.

The executors filed a demurrer to this bill, which was first overruled and afterwards re-instated by the chancellor, who also directed the executors to collect the money arising from the sales of the estate, (on a suggestion that the plaintiff would receive the *money* arising from sales of the land,) and retain it, subject to the future order of the court ; and, afterwards, he sustained the demurrer, on the ground that it was a devise of money, and not of lands, and decreed the bill to be dismissed ; from which decree an appeal was entered to this court.

While it must be admitted that aliens are not competent to take and hold lands by devise, it is equally clear that they are competent to take personal property ; and if personal property is granted or devised to them, or land *passing as personal property*, the disposition thereof cannot be vacated or avoided in consequence of any previous intention in the devisor or grantor to evade the provisions of the laws of alienage. The question will merely be, whether it is real or personal estate which is granted. The intention of the testator in this case, therefore, as stated in the bill, and admitted by the demurrer, proves nothing against the right of the appellees, if the estate granted be

personal estate ; if, on the contrary, it be real estate which is granted, that intention only fortifies and comes in aid of the general principle inferrible from a grant thereof to aliens, and makes it more clear that the policy of the law which forbids them to hold such property, was intended to be evaded. I may therefore throw this admission out of the case, and consider it as if the demurrer had not existed.

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I will begin by saying, that courts of equity now consider a trust estate, either when expressly declared, or resulting by necessary implication as equivalent to the legal ownership, governed by the same rules, and liable to the same charges. (a) 2 Bl. Com. 337; 7 Bac. Abr. 135. Again, a trust is defined to be a right to receive the profits of the land, and to dispose of the land in equity. (b) The question in this case, then, is, whether the devisees in question, but for the impediment of being aliens, would have taken the land itself, and not its proceeds ; whether it was a *real* or *personal* devise in their favour. Fortunately, the English books abound in cases, which, in my apprehension, leave no manner of doubt upon the subject.

As the great case of *Roper v. Radcliffe*, (c) is in principle decisive of the case before us, I will endeavour to give a brief statement of it. (c) 9 Mod. 167.

In that case, lands were conveyed in 1708, to A., B. and C., and their heirs, in trust to sell the same, and, out of the money to be raised by such sale, and out of the rents and profits until sold, to pay 4000*l.* due by mortgage, and the *surplus* to be paid to such person, or persons, as the testator should by will appoint, and, afterwards, by his will, he devised the *residue* of all his real and personal estate to A., B., C. and D., and their heirs and assigns, and made them joint executors, and by an after codicil devised all the remainder to *Radcliffe* and *Constable*, two of his executors. These two executors filed a bill against the trustees, &c., to have the lands sold, and an account of the profits, and the *surplus* to be equally divided between them. The answer insisted that the plaintiffs were papists, and incapable of purchasing lands by the statute of 11th and 12th Wm. 3, ch. 4 ; and that one of the defendants is the heir at law, and a protestant. The opinion of four judges, and the master of the rolls, in opposition to that of chief justice *Parker*, was, that the devise of the residue was a good

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(a) 10 Mod. 242.
(b) 5 Bro. Parl.
cases, 360.

devise, for that the *surplus* money was a *personal interest* in them, and therefore the devise not void by the statute. On an appeal to the house of lords, this decree was reversed, July 11th, 1713, by a GREAT MAJORITY of the lords, six judges being also for reversing, and five against it ; (a) and it was resolved by them, " that so much of the decree as declares that the " residue was a *personal interest* should be reversed." (b) We are informed, in 9 Mod. 167, more particularly, that it was resolved by the house of lords, on this appeal, that, although lands devised for the payment of debts and legacies are to be considered as money, *so far as there are debts and specific legacies* to be paid, yet the *heir* hath an interest therein by a *resulting trust*, so far as they are of value, after the debts and legacies are paid, and may come into equity to restrain the executors from selling more than is necessary for debts and legacies, and enforce the devisee to convey the residue to him, which residue *shall not be deemed as money*, nor shall it go to the executors of the testator ; or he may pray a conveyance of the *whole* land, offering to pay the debts and legacies, for that the devisee is only a trustee for the testator to pay his debts and legacies ; and that this is a privilege always granted to the *residuary legatee* ; for, if he comes into equity, and tenders what is sufficient for debts and legacies, there shall be no sale ; and so, only *pro tanto* : it was therefore resolved that, although lands given in trust, or devised for payment of debts and legacies are deemed as money in respect of *creditors* and *legatees*, yet it is not so as to the *heir* or *residuary legatee*, for in those cases it shall be considered as *LAND* ; and, if so, then, in the principal case, the residue being devised to papists, shall be deemed *lands*, and consequently a purchase within the act : for which reasons the decree was reversed by the house of lords.

This decision by the house of lords has been often recognized and admitted by the courts in England, and has never been departed from. In 2 P. Wms. 10, *Hill v. Filkin*, it is said by the lord chancellor, that the case of *Roper v Radcliffe* must not be now disputed. In *Davers v. Darnes*, 3 P. Wms. 46, it is held by the chancellor, " that the point had been settled in the case " of *Roper v. Radcliffe* in the house of lords, after so solemn a " debate as ought to render it *conclusive* to all the courts of " Westminster ; that, accordingly, *several subsequent resolu-*

"tions had been made pursuant thereto, and to recede from it " would create great confusion ;" and that, " as the devisee of " the *Surplus* might, in equity, on paying the debts, &c., elect " to take the land and *prevent* the sale, it was *therefore* held to " be a *purchase of land* under the act." In *Carrick v. Errington*, (a) the case of *Roper v. Radcliffe* was also recognized and admitted ; and the decree was also affirmed *by the House of Lords*. (b) So, in 2 P. Wms. 4, the decree of reversal in the case of *Roper v. Radcliffe*, is considered as having *settled the Law* on this subject. In the case of the *Attorney General v. Lord Weymouth*, to be presently more particularly noticed, the decision in *Roper v. Radcliffe* is also unequivocally admitted.

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(a) 2 P. Wms.
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(b) 2 Bro. Parl.
cases, 412.

In the case of *Rex v. Wivelingham, Dougl. 770*, Lord Mansfield mentioned the case of *Roper v. Radcliffe* to show " that " the devisee of the surplus arising from the sale of lands after " payment of debts and legacies, has an equitable interest in the " lands themselves, it being," (or *because* it was) "*in his option* " to pay the debts and legacies, and keep the land."

These are some of the decisions, which shew that the law, as laid down by the Lords in the case of *Roper v. Radcliffe*, is considered as *settled*, and cannot be departed from.

It is true, that, in the case of *Foone v. Blount*, (c) Lord Mansfield is reported to have expressed some dissatisfaction with the decision in *Roper v. Radcliffe* ; but that is of no importance : 1st, because being the case of a *Papist* CREDITOR, and not a *Papist* RESIDUARY LEGATEE, the decision given in this case *conformed* to that in *Roper v. Radcliffe*, and was in nothing opposed by it ; and, therefore, it was rather *extra-judicial* in that judge to go out of his way and find fault of the decision on a point not then before the court : 2dly, because in his opinion, he *admits* that if the decision in *Roper v. Radcliffe*, was parallel to the case before the court, " it being a decision by the " House of Lords, *we must have been bound by it*." He, also, in a subsequent part of his opinion admits the law to be *settled* by that decision, as it relates to a devise of the *Surplus* ; the case now before us : And, 3dly, because, in the before mentioned case of *Rex v. Wivelingham, five years afterwards*, this same judge quoted and relied upon the case of *Roper v. Radcliffe*, as having *settled the Law* upon the subject.

(c) Comp. 467.
(Anno. 1776)

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(a) *Ambl.* 20.

In principle, also, and almost in terms, the before mentioned case of the *Attorney General v. Lord Weymouth*, (a) is similar to that of *Roper v. Radcliffe*, and equally decisive of the case before us. In that case, Sir J. James, in 1740, devised "to A., "B. and C., his executors, their heirs and assigns, for the use of "them, their heirs and assigns, all his manors, &c., and all his "real estate, in trust to *sell and dispose thereof as soon as might "be conveniently done after his death*, and to pay all the monies "to arise from that sale, *and the rents, issues and profits, in the "mean time*, and until such sale, unto such person or persons, "and for such uses as he should thereafter give and bequeath "the same;" and, after giving several legacies charged on his land in aid of his personal estate, he gave the monies arising from such sale *and the rents and profits*, in the mean time, and until such sale, to A., B. and C., in trust to pay one half to Bethlehem Hospital, and the other to St. George's Hospital. A bill was brought by the Attorney General, at the relation of the hospitals, against the Trustees and Lord *Weymouth* and others, heirs at law; praying the estate to be sold, and the *money*; and rents and profits, to be *paid to them, &c.* Lord *Weymouth* pleaded the statute 9 Geo. 2. (mortmain act :) and, by the Lord Chancellor,—“I will not encourage persons to try the *experiment* of leaving their LANDS to Charities in this manner, when “there is a mode of doing it pointed out by the statute; viz., “by deed. The provision of the act is, that no LANDS, nor “personal estate to be laid out in the purchase of lands, shall be “given, granted, aliened, limited, released, assigned and transferred, or appointed, or any ways conveyed, or settled upon “any person for any estate or interest, or any ways charged or “incumbered, &c. in trust for any charitable uses whatsoever.” “This,” adds the Lord Chancellor, “is a gift of the *land* itself. “It is a gift of the *rents and profits* until a sale; and how long it “will be before a sale nobody knows. Being a devise of the rents “and profits, it is a devise of the land itself. If this act of parliament *did not* STAND IN THE WAY,” (as does the disability of alienage in the case before us,) “the person entitled to the “residue *might* have come in, and prayed to have the land, in “this court, instead of the money, and have retained it as *lands* “and the rather as the testator has given them the profits ’till “the sale, so that it made them, in Equity, owners of the es-

"tate, and, therefore, this is as strong a case as that of *Roper v. Radcliffe*."

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So, in the case of *Hart v. Knott*, *Comp.* 43, where the testator devised lands in aid of his personal estate, in trust to be sold to pay his debts, legacies, and funeral expenses; and all the rest and residue of his real and personal estate to his wife, her heirs, executors and administrators; the *personal* estate being sufficient, it was held that the lands, devised in aid, passed to the wife by the residuary clause. It was resolved by Lord *Mansfield* and the Court, in that case, (which was Ejectment brought by the heir against the widow and devisee,) that it is, in substance and equity, a devise of a *charge* upon the estate, which may be *discharged* by payment of the incumbrance upon it, or, if not wanted, (as was the case in that case, as in *this*,) will rest in the *same state* as if it had not been made subject to the incumbrance; that is, it would *remain* LAND. They also held, that, if the land had been sold, after payment of what was wanted, the rest of the money must go to the *person* to whom, under the residuary clause, the LAND *itself was to go*; and the *postea* was delivered to the *defendant*, the widow.

These cases are conclusive to shew that, although a devise of lands to be sold, &c. is to be considered a personal interest as it respects *creditors and specific legatees*, it is considered as LAND in relation to the *heir and residuary legatee*; and that where none of it is wanting to pay debts and legacies, (which the demurrer admits to be the case in the case before us,) it may be *retained as land*, against the heir, even in a Court of Law: in other words, it will, in that event, remain *land*.

I will add that, although this doctrine of the law is said to have arisen from the power of electing to take it as land, no such election is necessary to be actually made to perfect its character as land; nor is the doctrine varied where the devisee is disabled to take land, and consequently to make the election, by being a Papist, or a Corporation within the meaning of the statutes of mortmain, as the before mentioned cases clearly shew. The case of the *Attorney General v. Lord Weymouth*, clearly *admits* that no election need be made, in stating that the election of land *might* have been made, if the disability created by the act of parliament "did not stand in the way." The question as to the character of the devise is to be first con-

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sidered, in exclusion of that arising from the disability in question; and, when it is established to be *land*, considered in that relation, the disability then attaches, and vests the property in the Commonwealth in the case before us. No confusion can arise in this respect, but by blending two questions, which ought to be considered separately, and in succession. As to the necessity of making an actual election in order to *vest* the property as *LAND*, the foregoing cases clearly shew that *land* has, under the circumstances before us, been recovered as *land*, which has not only *not* been elected to be claimed as land, but, on the contrary, has been claimed as *money*. The better principle seems to be that, which is distinctly stated in the modern case of *Hart v. Knot*, before mentioned, that the devise to the *residuary legatee* is a devise of land, subject, however, to a charge in favour of creditors and specific legatees to the amount of their respective claims; and it is farther seen that if this charge does not exist, (as in the case before us,) and so proportionably where it exists only in part, it will retain its original character of land.

I have said that no election of the devised subject as *land* is necessary to be made, and that, on the contrary, it is held to be *land*, although the party may have elected to claim it as money. In the two cases of *Roper v. Radcliffe*, and *Attorney General v. Lord Weymouth*, the interests were esteemed by the plaintiffs as *MONEY*, and not as lands; and yet it was adjudged that they enured to them as lands: the plaintiffs in those cases surely would not have claimed them as *lands*, as they were severally disabled to take *lands*. So, in the case of *Hart v. Knot*, the residuary legatee elected to claim *NOTHING*: she was defendant in ejectment, and had done nothing; and yet the interest was adjudged to vest in her as *land*.

It follows as a necessary corollary from this principle, that it is of no importance, that the devisee is incapable of electing land, as being disabled to hold it. The objection equally lay in the papist and mortmain cases before mentioned, and yet was disregarded. It is certainly of no account, if the character of the devise does not depend upon an actual election, and is not varied where no election of any thing is made, or where the election made is of *money*. The true principle is that, before mentioned; that it is a devise of the *land*, subject to the

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(a) 1 Wash. 206.

charge, and where the charge does not in fact exist, or as far as it does not exist, the subject remains what it was *before*; that is to say, *land*. That character arises from "the option" to take it as land, which option may also be carried into effect by merely remaining neuter, as in the case of *Hart v. Knot*. That case is analogous to the case of *Shermer v. Shermer's executors*, in this court.(a) In that case, the estate being devised, after a life estate in the testator's wife, to "whoever she should "think proper to make her heir or heirs," it was held that she took a fee, from "the power to name the person or persons she "might choose to succeed to her part:" and it was farther held that, on her failure to make a specific nomination of any person, "by suffering her legal representatives to succeed her, "she actually made them her heir or heirs, as much as she "would have done by pointing them out by an express de- "vise." The principle of this decision, in both aspects, applies entirely to the present case.

These principles and authorities are decisive of the case before us. The character of the interest is first to be settled, before the question of alienage arises; and, in *principle*, there is no difference between this case and those of papist and mortmain devisees before mentioned, in which the disability to elect and hold land was not made, or, if made, was over-ruled.

On these grounds, without stopping to inquire into the character of the estate from the circumstance of its being a devise of the *rents and profits*, I am of opinion that the devisees took the inheritance of the land itself by the devise before us; and, it being agreed that they are aliens, that the same enured to the Commonwealth on the ground of forfeiture by an alienation to aliens.

I am also of opinion that the cases cited clearly prove that a Bill in Equity is the proper proceeding to enforce the trust in the case before us. As to what is said of its being rigorous, and contrary to the principles of a Court of Equity, to sustain the bill in the present case, I will remark that it has been holden by the House of Lords,(b) that the disability of an alien to purchase lands was *not a penalty or forfeiture*, but arose from the *policy* of the law; and that, on this ground, a

(b) 4 Bro. Parl. cases, and Park-
er's Reports. p.
163.

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demurrer to a bill praying a discovery in this particular was overruled.

On all these grounds, I am of opinion that the decree of the Chancellor is erroneous; and that the demurrer should have been overruled, and the Bill sustained.

Thus considering the law of this case, I regret to learn that the decree of the Chancellor is to be affirmed by the equal suffrages of the judges of this Court: and this the rather, because I am authorized by judge BROOKE(1) to say, that his present impression would incline him to say that that decree ought to be reversed.

Judge FLEMING. In ordinary cases, where judgments or decrees are affirmed by the unanimous opinion of the court, it is seldom necessary to assign reasons for such affirmances; but, in cases of magnitude, especially where there is a division in the court, the reasoning of the judges, respectively, will probably be expected: and I deeply regret that, on this occasion, one of our enlightened brethren thought he had reason to withdraw himself from the cause; and the circumstance is the more to be lamented, as the other members of the Court are equally divided in opinion.

Although eminent talents and great ingenuity were displayed on both sides, in the several elaborate arguments of this important cause, its merits seem comprised within a narrow compass; the principal question being whether a citizen of the Commonwealth may legally devise his lands, lying within the same, to his executors in *trust*, to be by them sold to citizens of the Commonwealth, and the money arising from the sales remitted to his *alien* relations in a foreign country? The Commonwealth denies the *right* of the testator to make such devise; claims the lands by way of *escheat*; or rather, the money for which they have been, or may be sold; and comes into a court of *equity* to assert its right, exhibiting a *bill* therein, complaining, among other things, "that *Thomas Bryan Martin*, "being seized and possessed of a considerable estate, both real "and personal, and well knowing that his relations, as British "subjects, could not inherit his real estate in Virginia, in the

(1) Note. Judge BROOKE was present in court at this time.

" event of his dying intestate, advised, and took counsel, to discover in what manner he might most effectually secure his estate, after his decease, or the greater part thereof, to his sisters, who were, and still remain, British subjects, and aliens to the Commonwealth." The bill further charges, "that Robert Mackey and John S. Woodcock, executors and trustees under the will of the said Thomas Bryan Martin, although the escheator of the Commonwealth, immediately after they assumed upon themselves their said character, notified to them the claim of the said Commonwealth, and did actually hold an inquest of escheat, they, the said executors and trustees, contending that the lands devised by the said Martin, as aforesaid, were devised to them in fee simple, have since sold the greater part, if not the whole, of the said lands." The bill proceeds further to charge, "that, from the whole structure of the said will, a trust is in law and equity, created thereby, the execution of which may be demanded in favour, and for the use and benefit, of the said Commonwealth, and the prayer of the bill is, "that the said Mackey and Woodcock may be decreed to perform the said trust, contained in the said will, in favour of the Commonwealth, so far as the said Commonwealth may be entitled to demand the same." A very just reservation, and qualification of the prayer, indeed.

Although the cause was instituted in a Court of Equity, it was argued altogether on legal principles; and I have considered it, first, as a question of law; and then, briefly, as a case in equity:

As an officer of the public, I have ever been attentive to, and careful to preserve, the rights, and just interests, of the commonwealth; but I cannot render unto Caesar things that, in my conception, are not Caesar's.

Neither the draftsman of the bill, nor his coadjutors in the arguments, have convinced me that the testator had not a right, both in law and equity, (and more especially in the latter) to dispose of his estate in the manner prescribed by his will: but, had he died intestate, his lands would not have escheated; for, though his sisters in England, being aliens, could not have inherited his lands in Virginia; yet, he had relations who were, and still are, citizens of the Commonwealth, and capable of inheriting his lands within the same. That circum-

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stance, however, not being stated in the record, I have considered the case, as it was argued, on a supposition that he had no relation capable of such inheritance. It is not contended but that the testator, at the time of making his *will*, was a citizen of the Commonwealth; and that he remained so to the day of his death: he had capacity then to dispose of his estate, by *will*, to *whomsoever* he pleased, and in any manner he thought proper, not prohibited by the *law* of the land: though one of the counsel said, "he intended to play a *trick* on the Commonwealth." And another of them, in plainer language said, "he intended to *defraud* the Commonwealth of its *right of escheat*:" but, from what source that right is derived, I must confess, I have yet to learn. To me it seems a novel doctrine that it is *fraudulent* for a man to devise his justly acquired estate to citizens in trust, for the benevolent, and meritorious purposes, the use and benefit of his nearest, and dearest relations, who might probably be in great need of his bounty. But let us inquire by what law he was prohibited or restrained from making such devise? By the *English* laws, founded on *policy*, say the council for the Commonwealth. It is admitted that we borrow many of our laws, especially some of those applicable to the subject before us, from the laws of England; by which *alone* the claim of the Commonwealth was advocated in the arguments of this cause.

It was justly remarked by that great oracle of the *law* (Lord COKE,) "that it was not sufficient *simply* to know the "law, but it was also necessary to understand the *reason* "thereof; as a guide to just and rational decisions:"—and much having been said on this occasion respecting its *reason* and *policy*, I proceed, first to consider the reason and policy of the *English* laws respecting *aliens* holding *lands* and *personal* estate within the kingdom; and then, *briefly*, consider the *policy* and *spirit* of our own laws on the subject.

With respect to *lands*, it took its rise, in England, under the feudal system, when every holder of land owed allegiance to the Crown, and was bound, in consideration of protection, to assist in defending the realm; which might be inconsistent with the allegiance which an *alien* owes to his own natural Liege Lord:—besides that thereby they might be, in time, subject to foreign influence, and feel other inconveniences.

Yet, notwithstanding the sound *policy* of this law, so strictly adhered to and enforced in *England*, *aliens* may there rent houses, on long leases, for the convenience of trade, which they may, and do, exercise freely, and thereby acquire property, to the amount of millions in goods, money, and other personal estate :—also, an alien may there bring and maintain an action, concerning personal property, and may make a will and thereby dispose of his personal estate. (a).

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(a) *Lutw.* 34, -
1 *Black. Com.*
372.

The testator, in the case before us then, by devising his lands to citizens to be sold to citizens, and directing the purchase money to be remitted to his *alien* sisters abroad, committed no breach of the *letter*, *spirit* or *policy* of the English laws ; and consequently none of our's either.

Thomas Bryan Martin might undoubtedly, by *deed*, have conveyed his lands in *trust*, with power to the trustees, at their discretion, to sell the same to *citizens*, in *his own life time* ; and to remit the product of the sales to his alien sisters in *England* ; and I wish to be informed what is the difference, or *injury* to the Commonwealth, in his having done so, by his last will and testament, and the trust to be executed after his decease ?

The only rational ground for prohibitory laws, in any country, restraining the free exercise of a citizen's discretion in disposing of his estate, either by deed or by *will*, (that great spur to industry, and one of the dearest privileges known in civil society,) must be the *safety of the state*. And, surely, *that* can be no more endangered by the purchasers of the lands under the will of *Thomas Bryan Martin* (being *citizens*) holding the same, than if the testator was still living, and holding them in his own right. (1)

Thus much for the *reason* and *policy* of the *English* laws. But Mr. *Wirt* urged, with *vehemence*, " that the *strong ground of policy* applies as well to money as to lands ;" for, says he, " an alien, holding money, may throw it into the hands of enemies,

(1) Note. In the decline of the *Roman* Empire, one of the greatest grievances complained of by the people, in some of the distant provinces, was the tyranny of their governors, in denying them the privilege of alienating their property. The tyranny, indeed, began in the city of *Rome* in the time of *Augustus*, before he became emperor, when the citizens were allowed to dispose of only three fourths of their property by will.

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and thereby endanger the public safety." But the laws of England, their commentators and judges, all clearly distinguish between them ;—or why do they to this day permit and even encourage, *aliens* to acquire and hold, to their own use and benefit, personal property to any amount and to maintain actions, for the recovery of it, from *British* subjects ?

In a modern case, in the Court of King's Bench, whilst Lord MANSFIELD presided there, the whole Court were of opinion that an action was maintainable on a ransom bill, although the plaintiff was an *alien enemy* at the time of the contract, and the defendant a British subject ; and gave judgment accordingly. See *Ricord v. Bettenham*, 3 *Burrow*, 1734.

It is said, however, that that case has been overruled in the Exchequer Chamber. Be it so ;—the circumstance does not affect the present question ; and the case was mentioned merely to shew the great *liberality* and *justice* of the Court of King's Bench, in deciding on contracts made between British subjects and their *alien enemies*.

Had *Thomas Bryan Martin's* estate consisted wholly of personal property, can the counsel for the Commonwealth, or the most sceptical casuist, deny that he might well have bequeathed the same to his *alien* sisters abroad ? why not then sell his lands to *citizens* of the Commonwealth, and remit their product in money, to those *alien* sisters ?—The proprietors, purchasers of those lands, still owe allegiance to the Commonwealth, and are equally bound with other citizens to aid in its defence. But, says Mr. Attorney General, " a devise of the *rents* and *profits* of the land was a devise of the land itself." That, as a *general position*, seems an argument of force, and is supported by some authorities ;—and if, in the case before us, the devise of the *rents* and *profits* had been absolute, without a qualification, the argument would have weight ; but it is only a *partial* devise of the *rents* and *profits*, limited and controlled by the *will* ; and the intention and particular direction of the testator must govern throughout ; not being, in my apprehension, prohibited or restrained by *law*.

But it was further contended, that by the devise of the *rents* and *profits*, even for a short, limited time, " the *lands* passed to the devisees."—That doctrine is clearly refuted by

the case of *Doughty v. Bull*, 2 *Peere Wms.* 320, where the Master of the Rolls decreed that lands devised to be sold when the trustees should think fit, the *rents and profits* going to certain devisees for a time, at the discretion of the trustees, must at length be sold under the devise : which decree was affirmed by the Lord Chancellor KING, and has never been overruled, so far as I can learn. It is a strong case, precisely in point, and forcibly applies to the one before the Court ;—upon these plain and well-settled principles, that the manifest intention and direction of the testator, not prohibited by law, must prevail ; and that lands devised to be sold are thereby made personal estate. 2 *P. Wms.* 323. But the case of *Roper v. Radcliffe* was cited and much relied on by the counsel for the Commonwealth, which applies not to the case before the Court, as not being the case of an *alien* but of a *papist* ; and predicated on the statute of the 11th and 12th of *William* the third ;—a political act of parliament, the object of which was the better to secure the protestant succession to the crown of Great-Britain, at that time thought to be in danger, from the adherents to the house of *Stuart*, who were chiefly Roman Catholics. And the decision was on an appeal to a House of Lords extremely jealous of the influence of popery, and strongly devoted to the then reigning monarch ;—it was also against the general opinion, and reasoning of the judges, and gentlemen of the bar in Westminster Hall. And, to this day, the judges in England pay respect to the decision, not on account of its justice, but, because the statute of *William* against *popery*, on which it was founded, remains unrepealed, and a protestant monarch, of the same dynasty, is still on the throne. That act of parliament was never in force here ; but its principles are condemned, reprobated, and held in abhorrence, by our *bill of rights, constitution* and *subsequent acts of assembly*, as unjust and incompatible with the *genius* of a free government ; and therefore, I consider myself not bound by that case, nor will I pay respect to it.

Although the fountain of justice is, perhaps, as pure in *England*, as in any part of the universe, yet we all know that the stream even there, has been sometimes polluted by the undue influence of the crown. But, admitting, for a moment, the case of *Roper v. Radcliffe* to be authority in this Court, it could

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have no effect on the decision of this cause; for the disabilities of aliens and papists even in England are various and materially different. (1)

But these were other cases cited to shew, that, where lands are devised to be sold, and the purchase money appropriated to particular purposes, the *heir* has an election to pay the money and take the land. But, in the case before us, the legatees could have no such election; because, being *aliens*, they could neither take the lands by descent, nor hold them by purchase.

Lord MANSFIELD, in giving his opinion in the case of *Foone v. Blount*, in *Conquer* 464, where the case of *Roper v. Radcliffe* was cited, observed, "that a Roman Catholic, being disabled by statute from taking and holding lands, shall not make his election, because there is a law which says, that, being a *papist*, he shall not take the land; and therefore a Court of Equity would decree that he should take it in money."—So, in the case before us, the devisees of *Martin* being *aliens*, incapable of taking lands by descent, or holding them by purchase, are disabled from making an election; and therefore must take the money bequeathed to them, arising out of the sales of the lands, made to citizens of the Commonwealth, or of the United States.

As to escheats, there were two kinds known to the ancient *English* laws, the one *regal*, and the other *feudal*; the former were forfeitures which belonged to the king by ancient right and prerogative of the crown, as where a person commits treason, his estate shall *escheat*, and be forfeited to the king: the other which accrued to every Lord of the fee, as well as to the king, by reason of his seignory; as by the death of his tenant, intestate, leaving no heir; and such would have been the case before us, according to precedents, had *Thomas Bryan Martin* died intestate in the life time of the late Lord FAIRFAX, to whom the lands, being within his proprietary, would have escheated in default of an heir of the intestate, capable of inheriting. And admitting that the same right of escheat, possessed by Lord Fairfax, since his demise became vested in the Commonwealth, (of which some have doubts,) yet the right

(1) Note. See *Statutes* 3 *Car.* 1; 2 *Car.* 2.; 1 *Wm.* and *Mary*; 11 and 12 *Wm.* 3; 13 *Ann*; 1 *Geo.* 1.; 3 *Geo.* 1.; 11 *Geo.* 2.; 33 *Geo.* 2.; and others.

of escheat is purely of a legal nature, where equity cannot, or should not, interfere, in aid of the right, so claimed by the Commonwealth.

Besides, had *Thomas Bryan Martin* died intestate, leaving no heir capable of inheriting his lands in Virginia, before the Commonwealth could have been entitled by escheat, there must have been an *inquest*, and *office found*, to establish those facts, and, by way of *instruction*, minutely describing the lands charged to be so escheatable.

It is true, that the bill states, "that the escheator of the Commonwealth, immediately after the said *Mackey* and *Woodcock* assumed upon themselves the said character of ex-cutors and trustees, notified to them the claim of the Commonwealth, and did actually hold an *inquest of escheat*;" but what proceedings were had on the said inquest, or what was the result thereof, is not stated in the bill, nor does it appear in any part of the record:—and, if we may be allowed to presume any thing on the subject, the presumption is that the result was adverse to the claim of the Commonwealth, or it would undoubtedly have been set forth in the *bill*.

Having hitherto considered this case, (as it was argued,) under a view, and operation, of the laws of *England*, let us now advert a little to the *spirit*, *policy*, and progressive *lenity* and *liberality* of our own laws on the subject; which, in my conception, reflect great honour on our infant and beloved country;—and present an aspect of the cause widely different from that already noticed;—and are still more decisive.

By a clause in an act of assembly, passed in the year 1779, when we had just passed the Rubicon, and were at war with one of the most powerful nations on earth, and struggling "for *liberty* and *independence*" with halters about our necks, (some of our best citizens being proscribed as *rebels* by the British government,) and every man's PATRIOTISM put to the test, it was enacted, "that all persons, as well foreigners as others, shall have *right* to assign or transfer warrants or certificates of survey for lands, and any foreigner purchasing warrants for lands may locate and have the same surveyed, and, after returning a certificate of survey to the land office, shall be allowed the term of two years, either to become a citizen, or to transfer his *right* in such certificate of survey to some citizen of this, or any other of the United States of America?"

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That law is still in force, having been re-enacted in the year 1792. See *Rev. Code*, 1st vol. ch. 86. sect. 40. p. 147.

By an act directing the course of descents, passed in the year 1785, also now in force, it is provided, "that, in making title by *descent*, it shall be *no bar* to a party that any ancestor, through whom he derives his *descent*, is, or hath been, "an *alien*."

By an act passed in December 1785, intituled *an act concerning aliens*, it is enacted, "that in case that war arise between the United States of America and any foreign state, "the merchants, and people of such state, their families, "agents and servants, found in this Commonwealth at the beginning of the war, shall not be attached, either in their "body or goods because of such war; but shall be warned by "proclamation from the governor, (taking thereon the advice "of the council of state,) that they shall depart the Commonwealth with their families, agents and servants, aforesaid, "and their goods, freely, within forty days after the proclamation made and published. In the mean time they shall not "be impeached, nor let of their passage, or of making their "profit of their merchandizes, if they will sell them."

"And in case that, for default of wind, or of ship, or for sickness, or for other evident cause, they cannot depart the Commonwealth within *so short* a time, they shall have *other forty days, or so much more* as the necessity of their affairs may require, and the governor and council may think safe to allow; and, in the mean time, may *sell their merchandize* "as before is said."

Those *aliens* then, even in time of war, might legally depart unmolested with the money arising from the sales of their merchandise and other treasure, and throw it immediately into the hands of our enemies at their pleasure;—*Mr. Wirt's strong ground of policy* to the contrary notwithstanding.

The *justice and liberality* of those acts of our legislature, in the gloomy and *trying* times when they were enacted, speak for themselves, are highly praise-worthy, and need no further comments of mine.

It was argued, however, in this case, by Mr. Attorney General, that "the appellees, by their demurrer, confessed the

"contents of the bill to be true."—By the demurrer they confessed the *facts* charged in the bill, but by no means the inferences, drawn by the counsel, from those facts: for instance, they confess, "that their testator advised and took counsel to discover in what manner he might most effectually secure his estate after his decease, to his sisters, who were, and still remain, British subjects, and *aliens* to the Commonwealth, and that he made his will accordingly, of which he appointed them executors:—that they were notified by the *escheat* or the claim of the Commonwealth;—that he held an *inquest* of *escheat*, and that they sold part of the land, &c." But they deny that "from the whole structure of the *will*, a trust is, *in law and equity*, created thereby, the execution of which is in favour and for the use and benefit of the Commonwealth."—And such their *denial* is, in substance, stated and complained of in the *bill*.

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The object of the testator was, I conceive, not to play a *trick* on the Commonwealth, and defraud it of its *right of escheat*, (which *right*, in my apprehension, never existed, even *in idea*, 'till the claim was brought forward to public view by the *avarice* of an *escheator*, and advocated by counsel learned in the law, and well versed in the chicanery and subtleties of the profession, but it was to exclude his distant collateral relations here from inheriting his lands in Virginia, to the prejudice of his nearer and dearer relations in England, who, being *aliens*, had not capacity to inherit his lands, but might well take, to their own use and benefit, the product of them, when sold to citizens of this, or any of the United States of America. And will this government, whose citizens proudly boast of its *justice* and *magnanimity*, meanly stoop to extort from female indigence the pittance of a dying brother's bounty, and place the paltry amount in its coffers, under the specious pretext of guarding the *public safety*?—I shudder at the degrading idea, and confidently trust that such unworthy conduct will never be realized by our government.

As the case appears before the Court, if the Commonwealth has any *right*, (though I am clearly of opinion it has none,) it must be at *law*, for *equity* seems most decidedly in favour of the appellees; I am therefore of opinion that the decree sustain-

ing the demurrer, and dismissing the bill, is correct, and ought to be affirmed.

There being an equal division of the court, it follows, according to rule, that the decree is affirmed.

Decided, April
1st, 1816.

The Commonwealth against Selden. The Same against Seddon.

1. A testator bequeathed to his brothers David and James, (who were aliens,) "to be equally divided between them, the money arising from the sale of his land and other property, and from the supposed failure of heirs. The special verdict in Selden's case was as follows:—"We find that Robert Buchan, a citizen of the Commonwealth of Virginia, was seized and possessed of the lands in the inquisition and *monstrans de droit* mentioned in his demesne as of fee, on the 12th day of July, 1803, and, being so seized and possessed, did, on the same day and year, make his last will and testament, in writing, in these words," &c. The clause on which the controversy turned was the following:—"I give and bequeath to my brothers David and James, to be equally divided between them, the money arising from the sale of the land and other property, so that a sale and conveyance by the executors was effectual to the purchaser; and that the land did not escheat to the Commonwealth in consequence of the testator dying without heirs.

2. A deed of bargain and sale admitted to record on the acknowledgment of the bargainor in Court, without any actual delivery thereof to the bargainee, was determined to be good in law, as a deed delivered; the bargainee having entered upon the land immediately after the purchase; having paid a part of the purchase money; retained possession according to the bargain; and, upon being informed of the deed, approved thereof, and claimed title to the land thereby intended to be conveyed.

3. The finding of an Inquest of Escheat in favour of the Commonwealth will not take away the title of a purchaser claiming by a deed of bargain and sale, legally executed and recorded, before the Inquest was sealed; though without the knowledge of the bargainee until afterwards.

"and from the debts due to me at the time of my death; and, as they reside in Great Britain, it is my will that my executors make remittances to them, in bills of exchange, or in any other mode, as soon as they can. I appoint doctor John M. Daniel and Benjamin James, Esq. executors to this my last will and testament."

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The special verdict proceeds:—"And the said Robert Buchanan thereafter died, without altering or revoking the same. We find that the same lands, in the said inquisition and *monstrans de droit* mentioned are the lands directed by the said Buchan to be sold after his decease; and that his brothers David and James are aliens and subjects of a foreign kingdom, neither of whom have ever been, or resided, in this Commonwealth. We find that, at the death of the said Buchanan, he had no heir capable of taking or holding lands in Virginia; his next of kin and of blood being an alien. We find that the executors named in the said will duly qualified thereto, and, on the 20th day of March, 1804, having previously entered upon and possessed themselves of the said land in the inquisition described; and after having advertised the same for sale, did set up at public auction, the land in the *monstrans de droit* described, which was struck out to the said Selden as the highest bidder, upon a credit of one and two years; and the said Selden immediately thereafter entered upon the said land, paid one hundred dollars in part of the purchase money, and has retained the possession of the land to the present period. We find that the said executors John M. Daniel and Benjamin James signed and sealed a paper writing, purporting to be a deed from them to the plaintiff, which paper writing we find in the words and figures following, to wit;" &c. Then the verdict proceeds: "that the said executors John M. Daniel and Benjamin Jones presented the said paper writing, purporting to be a deed as aforesaid, to the County Court of Stafford, where the lands lie, and having acknowledged the same, it was admitted to record: that, prior to the admission thereof to record, the said plaintiff Carey Selden had not been presented with the said paper writing, and did not know of its being admitted to record; that he had no knowledge of the execution of the same until after

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" taking the inquest by the escheator in the *monstrans de droit*
" mentioned, but, when informed thereof, approved of the same,
" and claimed title to the lands thereby intended to be convey-
" ed to him by the said executors. We find that the said deed
" had never been delivered by the said executors to the said Sel-
" den, or seen by him before the inquisition aforesaid was seal-
" ed. We find that part of the purchase money hath been
" paid to the said executors, but not the whole. If, upon the
" whole matter, the law be for the Commonwealth, then we
" find for the Commonwealth; but, if the law be for the said
" Selden, then we find for him."

Upon this special verdict, the Court gave judgment in favour of Selden, and, on a similar verdict in favour of Seddon; from both which judgments, the Attorney for the Commonwealth appealed.

These cases were argued, in October, 1807, by the Attorney General for the appellant, and Williams and Randolph for the appellees, before Judges LYONS, FLEMING, ROANE, and TUCKER. On the part of the appellant three points were contended for; 1st. That the lands of Robert Buchan escheated to the Commonwealth, and were not protected from escheat by his will:—2d, That if the executors took a fee simple, it should be considered as held by them in trust for the Commonwealth:—and 3d, That the papers purporting to be deeds to Selden and Seddon, never having been delivered to, or seen by them, before the inquisition was sealed, could not be a bar to the claim of the Commonwealth.

In support of the first point it was said, there was no devise of the lands to the executors, but merely a power given them to sell, and that only from implication. There is a clear distinction between a devise to executors of land to be sold, and a mere power to sell. In the former case, the profits until the sale go to the executors; in the latter not. (a) In the former, the descent is broken, and the estate vested in the executors until the sale; in the latter the descent is not broken, but the estate is vested in the heir at law; and if there be no heir, it must go to the Commonwealth by escheat. (b) According to 1 Bac. 133, the King has a title before office found: the inquest of office is necessary only to give possession. And

(a) 4 Bac. Abr. 281; 2 Burr. 1028, Lancaster v. Thornton; Co. Litt. 112 b. 113 a 236 a.

(b) 2 Tuck. Bl. 244; Constn. of Virg. sect. 20.

since the Commonwealth is entitled to all escheats hereafter going to the King, it follows that, immediately on the death of the tenant without heir, the right of the escheat vests in the Commonwealth.

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There is not sufficient ground in this case for giving the executors an estate in fee by implication; for it is a rule that such estate can be allowed to arise only by a *necessary*, and not a merely *possible* implication, or intention, in the deviser. (a)

(a) 4 Bac. Abr.
288.

On the other side, it was insisted that, according to the evident intention of the testator, this was a devise of an estate in fee to the executors, by necessary implication; for as they were to *sell* the land, it must have been intended that *they* should convey it to the purchaser, (1) and not that such conveyance should be made by the *heir*: for, if no estate was vested in them, they could convey none.

The descent was certainly broken by this devise. In *Co. Litt.* 236 a., it is said, that a devise of lands "*to be sold by executors*," is the same as a devise "*to executors to be sold*." (b) See also 3 *Viner* 460 pl. 4; 8 *Viner* 459. In *Yates v. Compton*, 2 P. Wms. 309, the devise was "*that his executors should sell his lands*," and invest the money in purchasing an annuity for *Jane Styles*; it was decided that the descent was broken. So, in case of a devise that the testator's lands shall be sold by his executors for payment of his debts, it was holden that an interest in the land was given to the executors. (c) In 1 *Bro. Ch. cases*, 135, the testator having directed that all his estate in Kent should be sold forthwith, and, (after payment of several sums,) that the residue be vested in his executors for payment of debts, Lord Ch. Thurlow decided these to be *equitable* assets, and that the descent was broken. (c) 8 *Viner* 465. pl. 24. *Hardr.* 419, *Barrington v. Pincheon*. See also 8 *Viner* 465 pl. 22, and 462 pl. 1.

But, even admitting this to have been a naked power not coupled with an interest, the Commonwealth cannot take; for the executors have exercised that power, and the heir, if there was one, would be bound by it; for, even if the land descended to him, he could make no disposition, which would not be over-

(1) Note. See Rev. Code, 1st vol. chap. 92. sect. 45. p. 166, quoted, as to this point, by Mr. Randolph.

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reached by the sale of the executors, who may sell notwithstanding his sale. (a) Indeed, according to the case in *Co. Litt.* If the executors released to the heirs, such act is void, as not in conformity with the will. In like manner, the Lord, or the King, claiming by escheat, is precluded by the sale made by the executors. (b)

(a) 8 *Viner* 438.
pl. 2; 489. pl.
2. 3; *Co. Litt.*
285.6; 10 *Viner*
186. pl. 3; 3
Bulst. 43.
(b) *Hardr.* 419;
10 *Viner* 150.
pl. 20 note. *Leonard* 280; *Co. Litt.* 150. *Har-*
grove's note.

In support of the second point, the Attorney General referred to his argument in the case of the *Commonwealth v. Martin's executors*, which, together with that in opposition, need not here be inserted, the point in question being so fully discussed by the judges in their opinions in that case. (1)

In support of the third point, it was contended, that the writing produced did not possess the essential requisites of a deed. There were no parties to it. The name of Selden was indeed in it; but he was not a contracting party; never assented to it; and knew nothing of it until after the inquest was taken. It never was delivered to him at all, though it was recorded in court upon the acknowledgment of the executors; for that was merely an act of theirs without his participation. If it was delivered as an *assens*, the jury ought so to have found it; for the court can presume nothing in a special verdict.

(c) *Rev. Code*,
1st vol. ch. 90.
sect. 1. p. 156;
2 *Tuck. Bl.* 306.

Delivery is absolutely necessary to perfect a deed. (c) The verdict finding that a paper, purporting to be a deed, never was delivered, but assented to afterwards, does not make it a deed, but only a paper assented to, which was not a deed. We are here in a court of law, and the deed must have the legal requisites. Recording may be supposed equivalent to delivery; but the law requires delivery, as well as recording. A deed, if delivered, is good between the parties, though not recorded. Recording is a strong ground of inference that it has been delivered; but, in this case, that inference is prohibited by the express finding of the Jury that it never was delivered.

(1) Note. As to this point, Williams said, "I shall not stop to inquire whether the Commonwealth has any equity, or whether she can call for execution of the trust for her benefit. When that case is presented, it will be proper to consider it. This is a proceeding at common law."

In opposition to this point, it was remarked that, if the ex-
ecutors had only a naked power, it was not necessary for the
party purchasing, to have a deed; for he was in under the
will. (a)

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But if a deed be necessary, the one found by the Jury is
sufficient; being acknowledged in Court by the grantors; for,
although the appellees might have reversed the order admit-
ting it to record, or refused to take under it, no other person
could impugn it. When he was apprized of, and saw the deed,
he approved it, and claimed title. It had operation from the
acknowledgment and delivery in Court. The question pro-
pounded to the bargainor in such cases is, "do you acknow-
ledge this to be your act and deed, and deliver it as such?"
He would therefore be estopped from saying that nothing pass-
ed by the deed to the bargainee.

(a) 8 Fines 450.
pl. 1. 2; Co.
Litt. 285 b.; 4
Bro. Ch. cases
135.

The object of executing and recording a deed is that every
one may have notice of the person who should be tenant to the
principle. The Jury find that the appellee entered on the land,
and this deed (if one was necessary) gave him the legal estate.

In 5. Co. Rep. 84 b. it is held that if a man delivers a writing
as an escrow, to be his deed when certain conditions are per-
formed, and afterwards the obligor or obligee dies, and there-
after the conditions are performed, the deed is good; for there
was a *traditio inchoata* in the life of the parties. This case
proves that a deed, which is delivered, and is not complete,
will be good by subsequent events, even though one of the par-
ties dies before it is completed; and that the performance of
the condition will relate back to the delivery. So, here, the
appellee having accepted and claimed title under the acknow-
ledgment in Court, a new delivery to him in person was not ne-
cessary; but such acknowledgment related back to the first
delivery.

But, even if it took effect from the time of assent only, all
the authorities prove that the deed shall overreach the title,
as well of the king, as of the heir. If the delivery be to a per-
son pretending to be an agent, but not having authority, upon
the principal's approbation, the validity of the deed has refe-
rence to such delivery. (b) If then a deed which is void can
by such an act be made good, a fortiori, a deed not void may
be made good by the bargainee claiming title under it.

(b) 3 Co. Rep.
30 b.; Goddridge
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(a) 1 Salk. 301.

(b) 2 Salk. 618.

(c) Rev. Code
1st. vol. ch. 92.
sect. 45.

(d) 2 Call. 125—
190.

It is objected that it should have been delivered as an *escrow*. If that was necessary, the Court will adjudge the delivery to have been so intended; and then, when accepted, it will have relation, *ut res magis valeat quam pereat*. But, on this subject, the case of *Wankford v. Wankford*, (a) is decisive; from which it appears that an obligation delivered by A. to C. for the use of B. is the deed of A. 'till B. *refuses* to accept it. So in *Thompson v. Leach*, (b) it is said that a grant of goods *vests a property* in the grantee, and the sealing of a bond to another, in his absence, *makes it the bond* of the obligee, *immediately*, and *without notice*.

In reply to the argument in favour of the deed, the Attorney General submitted to the Court whether our Act of Assembly, (c) does not make a *deed necessary*, in order to pass the estate to the purchaser from the executors.

The recording of the deed is not equivalent to delivery. In *Eppes v. Randolph*, (d) the deed was re-acknowledged before witnesses, and recorded within four months after *being executed the second time*. The second execution of the deed (like the first) comprehended all its requisites, among which was delivery; but, here, that there was *no delivery* is expressly found.

No decision having been pronounced, the causes were re-argued in May, 1810, after the death of Judge LYONS, and again after the resignation of Judge TUCKER.

On the 1st of April, 1816, the President pronounced the Court's opinion, that the judgment be **AFFIRMED**.

Decided, Octo-
ber 11, 1816.

Garland against Bugg.

1. After a *Dis-
tringas* upon a
Judgment in De-
tinue has been
returned execut-

ed, but *without satisfaction*, if the Court, on the plaintiffs motion, direct the *Distringas* to be superseded, so far as it related to the specific property, and to be executed as to the alternative value, such order is not erroneous; but it seems, the plaintiff may have a new *distringas*, to be executed as to such value.

AFTER the affirmance by the Court of Appeals of the judgment obtained by *Bugg* against *Garland*, in Detinue for a fe-

male slave, (which case is reported in 1 H. & M. 374—377,) a writ of *distringas* issued on the said judgment, August 5th, 1807, and was returned, September 11th, 1807, “executed on the lot and houses in which the said *Garland* lived.”

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September 23d, 1808, an order was made by the District Court, on the motion of *Bugg*, directing the *distringas* issued “from the office of the said Court, to be superseded, so far as it related to the specific property, and to be executed as to the “alternative value.” (a)

(a) See Rev.
Code, 1st vol. ch.
151, sect. 48, p.
305.

May 10th, 1809, on his farther motion, an order was made by the Superior Court of *Albermarle* County, (to which the record stood removed under the act of Assembly,) reciting, “that “the plaintiff *could not* have delivery of the slave,” and directing that a *ca. sa.* or *fi. fa.* might issue on the said judgment. Whereupon, a writ of *feri facias* was sued out of the Court last mentioned, and executed on the negro woman aforesaid, and two other slaves, who were sold for the sum of one hundred and eighty-five pounds, one shilling; and *Garland*, becoming the purchaser, on credit, by virtue of the act of Assembly concerning executions, passed January 31st, 1809, (b) gave bond and security for the money.

(b) See Acts of
1808., ch. 5.,
sect. 14, p. 8.

At October Term, 1809, a motion was made by *Garland* to the said Superior Court to quash the writ of *feri facias*, and to set aside the several orders aforesaid. It appeared to the Court, that, from the date of the judgment until the sale under the *fi. fa.*, the negro woman had remained in the possession of the defendant; with this exception, that before the date of the order superseding the *Distringas*, as to the specific thing, and after the issuing and levying that *Distringas*, the plaintiff, *Bugg*,

2. It is not necessary to state the reasons of such order on its face, because it will be presumed to be correct, unless the contrary appears.

3. After the *Distringas* upon a Judgment in Detinue has been executed without satisfaction, or superseded as to the specific property, and directed to be executed as to the alternative value, if it appear to the Court that, in consequence of the defendant's persisting in withholding the specific property, the plaintiff cannot get it by the *Distringas*, a *ca. sa.* or *fi. fa.* may be directed to be issued for the alternative value.

4. Notice of a motion to supersede a *Distringas*, or for a *ca. sa.*, or *fi. fa.* in lieu thereof, need not be given by the plaintiff to the defendant.

5. It seems, that, according to the Common Law, still in force in *Virginia*, the plaintiff in Detinue is not entitled to the issues of the defendant's lands or other property, received by the Sheriff upon the *Distringas*.

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found her at a distance from the defendant's house, took possession of her peaceably, and delivered her to a certain *John Penn, jr.* (to whom he had sold her provided possession of her could be peaceably had;) declaring, at the time, that he delivered her in pursuance of his contract; that *Penn* remained in possession about half an hour, in the town of *New-Glasgow*, (where the defendant lived,) and was about removing the slave, when he was met by the defendant, who demanded her, and finally compelled him to relinquish his possession; that *Bugg* was not present when she was thus retaken; that, for this act, the defendant commenced actions of trespass against *Bugg* and *Penn*, in the Superior Court of *Amherst*; contending that, as *Bugg* had resorted to his *distringas*, he was not warranted in taking said slave; in which suits he was cast; *Bugg* and *Penn* producing, in their defence, a bill of sale from *Garland* to *Bugg*, (who contended that he had also obtained a judgment for the same slave;) and it appearing that they had used no force. In support of his motion, *Garland* urged, that it did not appear from the record that any notice was given to him of the motions, on which the foregoing orders were made.

This being all the evidence offered by either party, the Court overruled the motion; whereupon *Garland* filed a bill of exceptions. He afterwards obtained a writ of *superedeas* from a judge of this Court, to stay all proceedings on the original judgment, and on the several orders aforesaid.

Wickham for the plaintiff in error, relied on the following points: 1st, That the order of the 23d of September 1808, was erroneous: being made *ex parte*, without notice; and no good cause for the same being stated on the record. Wherever a motion is made on facts to be proved by evidence *aliunde*, the opposite party ought to be summoned to give him an opportunity of controverting those facts.

2d. Admitting the said order to be in other respects proper, the Court had no right to make it after the *distringas* had been executed.

3d, The order of the 10th of May, 1809, was improper; the writ of *distringas* having been superceded only as to its object, and being in full force in point of execution; so that the appellant was made subject at the same time to the operation of a

distringas on his lands, and a *fi. fa.* against his goods for one and the same debt ; and this order was also erroneous in being *ex parte*, and without notice.

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4th. Under any circumstances, the awarding a *fi. fa.* for the alternative value after a *distringas* had been *executed*, was illegal.

This point is important because, in consequence of an oversight in this Court the judgment was affirmed, although the jury had fixed the value of the slave at a higher sum than that stated in the declaration.(1) At any rate the *distringas* should have been set aside. A *dictum* in 3 Bl. Com. 413., may be relied upon by the counsel, on the other side ; but it must be understood that the *fi. fa.* is to be allowed only as a substitute for the *distringas*, not as a cumulative remedy. It may be contended that the order awarding the *fi. fa.* *virtually* set aside the *distringas*. But how can it be so understood ? No direction is given that the sheriff should stay his hand.

5th. Credit ought to have been given for the issues received by the sheriff ; for he must have received some, as he took possession of an house. It is not to be inferred from the silence of the return on the execution, that there were no issues. In 8 Vintr 39. pl. 6, it is laid down that there may be a *fi. fa.*, where *no issues* are received on the *distringas*.

Wirt contra. The objection to the order for want of notice has been made and disposed of in this Court on sundry occasions. (a) The controversy is pending until consummated by execution, and the parties are in Court as to all motions and orders touching the execution itself. That no notice is necessary, was expressly considered and determined in the case of the Commonwealth v. Hewitt.

(a) The Commonwealth v. Hewitt, 2 H. & M. 181—188 ; Hendrick v. Dundas, 2 Wash. 50.

The objection taken to the same order, that it is not *stated for what cause* the writ of *distringas* was superseded, &c., is equally untenable : for Courts have a right to watch over the execution of their judgments, and to give them effect, *without assigning on the record the reasons of their orders* ; and they will be presumed to have done right, until the contrary appears.

(1) Note. In this position, Mr. Wickham appears to have been mistaken ; for, in the case of *Bigger's adm'r. v. Alderson*, 1 H. & M. 54, it was decided that, " in Detinue, the jury may exceed the prices of the slaves laid in the declaration."

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Mr. Wickham's objection to the order of May 10th, 1809, that a *fi. fa.* was thereby awarded, while the *distringas* was in full force, is incorrect in point of fact. The *distringas* in this case had been executed merely as a *distringas* to compel the production of the *specific thing*, and was returned executed on the 11th of September, 1807. The return day of the writ had passed: the return had been made: the writ was out of the sheriff's hands: it was *fundus officio*; and there was no possibility of its being re-levied, without a trespass by the officer. It is true it was still operating on the property of the defendant; but that operation was removed by the order of the 23d of September, 1808; by which, and by its return-day having passed, it was annihilated. That it had been executed as a *distringas* merely to force the delivery of the slaves, is apparent from the language of the writ itself. (1.) When the last mentioned order came to act upon the *distringas*, it was not to change the purpose or effect of its past execution: that order professes no such thing; nor is any such power given to the Court by the act of Assembly: the language of both is future; the words used being "*to be executed as to the alternative value.*"

The order of September 23d, 1808, had not itself the effect of an execution: it merely authorized the levying an execution for a particular object. At the time of making the order, there was no execution out, on which it could operate. Its effect, therefore, was to remove the operation of the former, and to authorize the plaintiff to take out a new *distringas*, with the new object of the alternative value. But, until he should do so, this order of permission was a dead letter, not binding in any way the real property of the defendant. It does not appear that the plaintiff ever availed himself of this permission; and the Court will not *presume* it for the purpose of vitiating the order of May 10th, 1809. On the contrary, that order will be presumed to have been correct, until the contrary appears. When, therefore, the Court was moved for the writ of *fi. fa.* in May, 1809, it is not correct in point of fact that there was

(1) Note. The *distringas* issued in this case was to compel the production of the negro woman "of the price of \$750, if she may be had, or the price aforesaid, if "she may not be had." And such appears to be the usual form of the writ of *distringas*: but it seems that the sheriff is not authorized to determine that the slave cannot be had, and thereupon to receive the alternative value.

another execution of a different character in full operation. There was at that time no execution out: the cause in the mean time had been carried up to the Court of Appeals after the return of the *distringas*; and it was on its return to the Court below, that the order of May, 1809, was made; as appears by that order itself.

The question is, whether, under these circumstances, the court erred in directing that the plaintiff might have either a *ca. sa.* or *fi. fa.*, at option.

That order, I insist, was right both at common law and by statute.

1. At common law.

The plaintiff is entitled to satisfaction of his judgment. True it is, he can have but one execution; but that must be an execution with satisfaction. Hence, if the defendant be taken on a *ca. sa.*, it is held that this is *no satisfaction*, but a security merely; and if he die in prison, the plaintiff may have a *fi. fa.* against his goods, or an *elegit* against his lands. (a) The plaintiff may change his execution as often as he pleases, unless in the case of a *valuable* execution, on which there has not only been a *seizure*, but a *satisfaction*. (b) But a *distringas* is not a valuable execution: it is a mere measure of constraint: the party is considered in contempt of the Court; and the rents, issues and profits go to the King, or to the Commonwealth; not to the plaintiff. (c)

2. It is only in consequence of the statute 10 Geo. 3. ch. 5., that the issues on the *distringas* are sold and applied to the plaintiff's demand; (d) a statute not in force in this country, and to which we have nothing analogous.

If the *distringas* be not a valuable execution; there is no objection to its going at the same time with a valuable one. Like a *ca. sa.*, it is a measure of constraint;—a security merely; and a *ca. sa.* and *fi. fa.* may issue together; (e) but both cannot be *executed*:—if one be executed, the Court will quash the other on motion. So, a *distringas* and writ of inquiry, or *capias* for damages, may be issued together. (f.)

The doctrine laid down in 3 Bl. Com. 413, seems written directly to fit this case. Mr. Wickham says it is a mere *dictum*; but Keilw. 64., the authority there referred to, fully supports the position of Blackstone; as also does 2 Mallory 426; and 8

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(a) Blumfield's case, 5 Co. Rep. 486, recognised in Taylor v. Dundas, 1 Wash. 96.

(b) Dykes v. Mercer, cited in 2d Ld. Raym. 1072; Hayling v. Mulhull, 2 Bl. Rep. 1236; 1 Lilly's Abr. 566; Hobart 57; 4 Com. Dig. 138; and 2 Mallory's Ent. 426.

(c) 6 Com. Dig. 100—101—Title PROCESS, D 7.

Gilbert's Law of Executions, 27, 28, 30, 31.

(d) 1 Sol. Pract. 230—1.

(e) 4 Com. Dig. 138.

(f) Coke's Entries, Derinov, pl. 1 p. 169. b.; Yelverton's Rep. 71, accord't.; Rastall, 212—213.

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(a) Echols v.
Graham, 1 Call
492.

Viner 40. pl. 15. But there can be no difficulty arising from the *distringas* and *fi. fa.* being both in operation at the same time; for a party, by suing out a second execution before the property taken on the first is sold, abandons the *lien* given to him by the first. (a)

Friday, October 11th 1816, the President pronounced the Court's opinion, that there was no error in the said Judgment and Orders; all of which were therefore affirmed, with costs and damages for retarding the execution thereof.

Decided October
15th, 1816.

Cooke against Graham's Administrator.

1. The condition of a bond being "whereas *Graham*, administrator of *William Graham* deceased, against the obligor did lend to *J. Stephen Cooke* in the Superior Court of Loudoun County. \$2500 of the obligee's money, and the said *J. W.* having failed, but before he failed paid \$500, and whereas the said obligor hath instituted a suit against said *J. W.* for the recovery of said money; now, if the said obligor shall pay the whole sum so lent, if it can be recovered from the said *Josiah Watson*, or his endorser, or, in case it cannot be wholly recovered, will lose the one half of that sum which cannot be recovered, then the above obligation shall be void, otherwise to remain in full force and virtue;"—a plea stating "that he the said obligor could not recover of *J. W.* or his endorser, the sum of money in the said condition mentioned, or any part thereof, and that he paid to the obligee one half of the sum which could not be so recovered, and the farther sum of five hundred dollars," is a good and sufficient plea in bar to an action upon the bond; without any farther averment that the said obligor had used due diligence in prosecuting the suit against *J. W.*; and without stating what measures he had taken to recover the money, or who the endorser was.

THIS was an action of debt on a bond, in behalf of *Edward Graham*, administrator of *William Graham* deceased, against *Stephen Cooke* in the Superior Court of Loudoun County. The declaration was, in the usual form, on a bond for five thousand dollars, payable to the intestate in his life time.—The defendant praying oyer of the condition of said bond, it was inserted in the record as follows:—

"Whereas the said *Stephen Cooke* did lend to *Josiah Watson*, of the town of Alexandria, twenty-five hundred dollars of the said *William Graham's* money; and the said *Josiah Watson* having failed, but before he failed paid five hundred dollars; and whereas the said *STEPHEN COOKE* hath instituted a suit against said *Josiah Watson* for the recovery of said money; now the condition of the above obligation is such, that if the said *Stephen Cooke* shall well and truly pay the whole sum so lent, if it can be recovered from the said *Josiah Watson*, or his endorser, or, in case it cannot be wholly recovered, will lose the one half of that sum which cannot be recovered, then the above obligation shall be void, otherwise to remain in full force and virtue;"—a plea stating "that he the said obligor could not recover of *J. W.* or his endorser, the sum of money in the said condition mentioned, or any part thereof, and that he paid to the obligee one half of the sum which could not be so recovered, and the farther sum of five hundred dollars," is a good and sufficient plea in bar to an action upon the bond; without any farther averment that the said obligor had used due diligence in prosecuting the suit against *J. W.*; and without stating what measures he had taken to recover the money, or who the endorser was.

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" he recovered, then the above obligation shall be void, other-
" wise to remain in full force and virtue." The defendant then
pleaded several pleas, among which it is sufficient to mention
the second, the cause having been decided by this Court upon
that plea only.—It was in the following words :—" And the
" said *Stephen*, by leave of the Court, for farther plea, saith,
" that the said plaintiff ought not to have or maintain his ac-
" tion aforesaid against him, because he saith, that he the
" said *Stephen* could not recover of *Josiah Watson*, or his en-
" dorser, the sum of money in the condition of the said writ-
" ing obligatory mentioned, or any part thereof; and the said
" *Stephen* farther saith, that he paid to the intestate of said
" plaintiff on the day of in the year one
" half of the sum which could not be so recovered, and the far-
" ther sum of five hundred dollars : and this the said *Stephen* is
" ready to verify."

To this plea the plaintiff filed a special demurrer, setting
forth the following causes of demurrer :

" 1st. Because the said defendant doth not set forth in his
" said Plea, that any suit was brought and prosecuted by him
" against the said *Josiah Watson* and his endorser.

" 2. Because it does not appear by the said Plea that the
" said defendant used *all due diligence* to secure and recover
" the aforesaid sum of 2500 dollars of the said *Josiah Watson*,
" or his endorser.

" 3. Because the said defendant in his said Plea does not
" shew that he used *all legal ways and means* to recover the
" amount of the said 2500 dollars of the said *Josiah Watson*,
" or of his endorser, or of the bail of the said *Josiah Watson*.

" 4. Because the said Plea does not state who the endorser
" of the note of the said *Josiah Watson* for the said 2500 dol-
" lars was.

" 5. Because the said defendant is bound to pay one half
" of the sum that is not recovered of the said *Josiah Watson*,
" or his endorser; and if the said defendant has recovered any
" part of the said 2500 dollars from the said *Josiah Watson*, or
" his endorser, then he is bound to pay one half of the sum
" not recovered to the said plaintiff as administrator aforesaid,
" which one half is 1000 dollars,—and also bound to pay \$500
" which he received.

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" 6. Because the said Plea is *double and multifarious*, in this
" that it contains two distinct matters; to wit, that the de-
" fendant could not recover the 2500 dollars of *Josiah Watson*,
" or his endorser, and that he had paid 1000 dollars, a part of
" the said 2500 dollars, to the intestate of the plaintiff, which
" are allegations to which separate and distinct answers may
" be made, and which therefore cannot be joined in one and
" the same Plea.

" 7. Because the said defendant in his said Plea does not
" give any answer as to the sum of 500 dollars, stated in the
" condition of the said bond to have been received by him of
" the said *Josiah Watson* before the execution of the said
" bond. (1)

" 8. The said Plea and the matter therein contained is in-
" formal and insufficient in law."

The Superior Court of law adjudged this demurrer to be
good, "because it was not alleged in the Plea that the defend-
" ant had used due diligence to recover the money from either
" *Watson* or his endorser,—or that he took any, and what
" measures to recover the same."

After further proceedings on the other Pleas, a Judgment
was rendered for the plaintiff, from which the defendant ap-
pealed to this Court.

Tuesday, October 15th 1816, the President pronounced the
Court's opinion, "that the Appellant in his second Plea having
" pleaded that he *could not recover* from the said *Josiah Wat-*
" *son* in the condition of the bond mentioned, or his endorser,
" the sum of money in the said condition also mentioned, *or*
" *any part thereof*; and that he has paid to the Appellee's in-
" testate one half of what could not be recovered; (to wit,
" one thousand dollars;) as well as five hundred dollars, stat-
" ed to have been paid by the said *Watson* before he failed;
" which averment is not only in the terms of the condition of
" the bond, but also *imports* that due diligence had been used
" by him to recover the same; and that averment not having
" been controverted by the Appellee, but, on the contrary, ad-
" mitted by the demurrer; the said Plea, so confessed, forms

(1) Note. This allegation appears to have proceeded from a mistake of the
plaintiff's Counsel.

"a bar to the action; and that, on this ground, without ad-
verting to any other, the said judgment is erroneous."

Judgment reversed, and entered that the appellant take
nothing, &c.

Decided Octo-
ber 18th 1818.

Sampson against Bryce, Executor of Mitchell.

UPON an Appeal from a Decree of the late Chancellor
WYTHE, pronounced the 10th of March 1803.

The object of the Bill, exhibited by the Appellee against
the Appellant and others, was to prevent the sale by the Sher-
riff, under an Execution at the suit of the Appellant, of certain
slaves, which had been bequeathed by the last will and testa-
ment of *Josias Payne* to his daughter the wife of *William Mit-
chell*, and delivered to her as her property by the executors of
her said father.—The Judgment in favour of *Sampson* was
against *William Harrison*, Executor of *Josias Payne*, for dama-
ges for a breach of Covenant committed by the said *Payne* in
his life time; whereupon a *fieri facias* was levied on the slaves
in question; to stay proceedings on which an Injunction was
awarded.

Harrison, by his answer, stated that *William Payne* and
Robert Payne (who never qualified) were appointed Executors,
as well as himself, who did qualify; that all the slaves of the
testator were specific legacies, and were bequeathed to the
said *William Payne*, *Robert Payne*, *Agga Mitchell*, and *Anna
Harrison* the respondent's wife, that, a considerable time be-
fore he qualified as Executor, the said *William* and *Robert
Payne* retained and delivered up the negroes to the different
legatees, so that the Respondent never was in possession of
any of them, *except his wife's legacy, which was sent him by
Robert Payne*.

The Chancellor perpetuated the Injunction, being of opi-
nion that the Execution could not lawfully be levied on the
slaves, which were in the peaceable possession of the plaintiff
by permission of the defendant *William Harrison*, if not by his
actual delivery.

And this Decree was AFFIRMED by the Court of Appeals.

1. A *fi. fa.*
against the es-
tate of a testator,
cannot lawfully
be levied on
slaves which,
being specifica-
lly bequeathed,
are in the pos-
session of the
legatees, as their
property, either
by actual deli-
very from the
Executor, or by
his permission.
* See *Burn-
ley v. Lambert*,
1 Wash. 308—
313, accordant.

2. In such
case a Court of
Equity may
award an In-
junction to pre-
vent the sale of
the property.
* See *Ran-
dolph v. Ran-
dolph*, &c. 3
Munf. 89; and
*Wilson & Trent
v. Buller* and
others. *Ibid* 559.

Decided October 19th 1816.

Sampson against Payne's Executor and Legatees.

1. A Creditor, having obtained a Judgment against an Executor as such, and sued out a *fi. fa. de bonis testatoris*, which proved ineffectual, may either resort to his action at law to establish a *deceit*, or file a bill in Equity against the Executor and legatees, for an account of assets, and proportional contribution to pay the debt. See *Burnley v. Lambert*, 1 Wash. 312.

THE Appellant filed his Bill in the late High Court of Chancery against *William Harrison*, acting Executor and legatees of *Josias Payne* deceased, *William Payne*, *Robert Payne*, and *Archibald Bryce*, executor of *William Mitchell* deceased, who were also legatees of the same *Josias Payne*, for the purpose of getting satisfaction of his judgment at law, mentioned *ante*, (in the case last reported,) out of the assets in the hands of the said *William Harrison*, of which he prayed an Account to be rendered, or by contribution of the legatees; from whom an account of the property received by each was also required.

The defendant *William Harrison*, by his answer, admitted, in substance, that the slaves specifically bequeathed by the Testator had been delivered to the legatees by their mutual consent; and that he received from *Robert Payne* those bequeathed to *Anna Harrison* his wife; but contended that, as all the legatees were equally bound in the Deed from the Testator to *Sampson*, they ought to pay their just proportions of the debt, according to what they enjoyed of the estate.

2. In such case, if there be a dispute between the Executor and legatees, whether, under the circumstances, he ought not to pay the debt without any contribution from them, and if some of them be not made parties, the Court may with propriety dismiss the Bill as to the Legatees;—but, if it appear that the Executor has delivered over to them property of the testator, which would have been sufficient to pay the debt, he ought to be decreed to pay it *de bonis propriis*, and left to his remedy against them.

Archibald Bryce, by his answer insisted that the whole debt ought, according to principles of equity, to be paid by *William Harrison* himself; because the Covenant, for breach of which the judgment was obtained, was entered into by the Testator *altogether for the benefit of the said Harrison*, and without any valuable consideration received by the former.

Robert Payne having departed this life, his Executor *Robert Payne* answered the Bill, and denied that his Testator had received any slaves, or other property, as legatee or distributee of the estate of *Josias Payne* deceased;—alleging that all the property held by the said *Robert Payne*, which once belonged to the said *Josias Payne*, was given by the latter to the former by a *Deed of Gift*, and held as the property of the donee some considerable time before the decease of the donor.

Chancellor WYTHE, on the 10th of March 1803, pronounced his opinion; observing, “that the questions controverted among the defendants are whether *William Harrison* be personally chargeable in equity with the damages and costs, re- covered by the plaintiff against that defendant, as Executor

" of *Josias Payne* ; and if he be not so chargeable, what portions thereof ought the other defendants, either all of them, or all except *Robert Payne*, (who claimeth indemnity,) to contribute?—Of these questions the Chancellor considered the former 'idle,' because a decree against *William Harrison* would not place the plaintiff in a situation better than that, which he before occupied, and yet occupieth, being at liberty to sue forth an *alias fieri facias* in execution of the District Court's judgment, and proceed to convict the Executor for a *devastavit* ; and the other is *impertinent* and *premature*, and cannot be regularly or definitively decided in a cause between this plaintiff and these defendants ; for to the plaintiff his money, paid by either party, is equally satisfactory ;—the creditors remedy against legatees ought not to be prosecuted before that against the Executor hath failed, or is suggested, through his insolvency, to have failed ;—of which neither is in this case ; and two of the legatees, *Josias Payne* the younger, and *John Payne* are not parties, and another of them, *William Payne*, hath not answered the Bill." The Bill was therefore dismissed with costs, but without prejudice to any suit, which the plaintiff might thereafter institute.

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From which Decree the plaintiff appealed.

March 26th, 1816, the case was submitted by *Nicholas* for the Appellant, and *Williams* for the Appellee.

Saturday, October 19th, 1816. Judge *BROOKE* pronounced the Court's opinion, as follows :

" The Court, (not adopting the reasons of the Chancellor, nor deciding the question between the Appellees, as to contribution,) approves of the said Decree, except so much thereof as dismisses the Bill as to the Appellee, *William Harrison* ; as to whom, though an action at law suggesting a *devastavit* might have been prosecuted against him, yet, as he was brought into the Court of Chancery for the purpose of relieving him from the payment of the whole amount of the judgment at law, by a contribution of the other defendants, and for his benefit, and as it appears, by the Exhibits and proofs in the Record, that he has wasted the estate of his testator by delivering it over to the

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tor and Lega-
tees.

Legatees, the Court is of opinion that a decree ought to have been rendered against him, for the amount of the judgment at law, after deducting the payment made to the Sheriff; and that, on these grounds, the said decree, so far as it dismisses the Bill as to the said *William Harrison*, is erroneous. Therefore it is decreed and ordered, that so much of the said Decree, as is above mentioned to be erroneous, be reversed and annulled, and that the residue thereof be affirmed: and the cause is remanded to the Superior Court of Chancery, to be proceeded in according to the foregoing principles."

Argued,
Wednesday,
October 16th,
1816.

Wilson against Davisson.

1. In Debt by DANIEL D. DAVISSON assignee of *Isaac Davisson*, brought the assignee of a suit on a bond against *Benjamin Wilson, jr.*, who pleaded that, bond, it is not a sufficient plea, before notice of the assignment, the effects of the assignor were attached in his, the defendant's hands, and a decree entered judgment, the effects of the assignor were attached in the defendant's hands, and a decree entered that he should pay the debt to the attaching creditor, on bond and security being given in the usual form;—and that, bond and security being afterwards given, he had paid the debt to the attaching creditor. To this plea the plaintiff *demurred*. The defendant also pleaded *payment*; and issue was joined on both pleas.

The case made by the declaration, first plea and demurrer, was, that the bond given by *Wilson* was dated December 24th, 1807, payable four years after date, and assigned to *Daniel D. Davisson*, on the 21st of February, 1808. The suit in Chancery, to attach the debt in the hands of *Wilson*, was instituted on the 22d of November, 1809, against *Isaac Davisson* and others; on which day it was decreed that *Wilson* should pay the amount of the note to the plaintiff in equity, when due, upon his giving security to return the amount to such persons as the Court should thereafter direct. At that time there was no notice of the assignment. Bond and security according to the

(1) Note. In *Wakefield v. Martin*, 3 Mass. T. Rep. 558, it was decided that even before notice of the assignment, an equitable interest is vested in the assignee, so that the debt can not be attached, as the property of the assignor. See 1 Bac. Abr. (*Wilson's Edition*) p. 249.

decree was given *on the 3d of May, 1813, after this suit had been brought* ; and, on the same day, *Wilson* paid the amount of the bond to the attaching creditor.

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Upon the Demurrer, the Superior Court of law gave judgment for the plaintiff, *without any trial of the plea of payment* ; whereupon, the defendant appealed.

Wickham for the Appellant, contended, 1st, that the decree in favour of the attaching creditor having been entered before notice of the assignment, the garnishee was bound to perform that decree : and the remedy of the assignee, if any, was against the attaching creditor, on his bond to refund : and 2dly that no final judgment ought to have been given against the defendant, until the issue on the plea of *payment* had been tried.

Nicholas for the Appellee insisted, 1st, that the bond having been *assigned* before the suit was brought to attach the debt, it was not a *debt due to Isaac Davisson* ; and therefore that the law on the demurrer was for the plaintiff ;—2dly, that the Decree under which the Appellant made the payment, was interlocutory only, and might have been set aside, on the circumstances of the case.

Wickham in reply. It was determined by the Decree, that it was a debt belonging to *Isaac Davisson*, and, as such, was directed to be paid to his creditor. Every decree of a Court of competent jurisdiction is presumed to be right until the contrary appears. An attachment regularly laid, and regularly discharged, is certainly a satisfaction of the debt. The seven years reserved, are for the benefit of the absent defendant. The garnishee is bound to pay upon the Court's order.

The case is analogous to that of an Executor's pleading former judgments ; which plea, if demurred to, is a bar ; the only way to controvert it being to reply that such judgments were obtained by fraud or connivance.

Monday, October 21st, 1816, Judge BROOKE pronounced the Court's opinion that the Superior Court was correct in sustaining the demurrer of the plaintiff to the plea of the defendant,

but erred in entering the Judgment before a trial of the plea of payment.

Judgment reversed, and cause remanded for a trial to be had therein of the plea of payment.

—

Decided, October 25th, 1816. **Hudson and others against Hudson's Administrator.**

1. An Administrator with the Will annexed having, with the consent of the widow, (who was tenant for life,) made certain additions, the utility and property of which were doubtful, and also sundry repairs, to a barn on the land; it was decided that the expense of those additions should be allowed him against the widow only; and of the reasonable repairs, against the widow and children generally.

THIS was a suit in Chancery, in behalf of the widow and children of *William C. Hudson* deceased, against *James Henderson*, Administrator with the Will annexed. The object of the Bill was to surcharge and falsify the administration account, which had been reported by commissioners, appointed by the County Court of *Amelia*, on *Henderson's* motion, and admitted to record; shewing a balance due to him, of 210*l.* 16*s.* 9*d.*, on the 24th of February, 1803; subject to credits in the estate's favour, amounting to 117*l.* 2*s.* 11*d.*, for bonds remaining in his hands uncollected. The plaintiffs particularly complained of certain charges, allowed by the commissioners to the defendant for medical services, and also for repairs and additions to a barn upon the plantation, which the widow alleged to be unnecessary, extravagant and injurious to the land; but the Bill contained, moreover, a prayer for a full, true, and fair account of all the sales of the personal estate, &c., and for general relief.

The defendant, by his answer, insisted that the account had already been fully and fairly settled by the commissioners, up to a certain time; that the plaintiff, *Mrs. Hudson*, was consulted on, and notified of the time and place of their meeting; was actually present while every item passed under their inspection, and acknowledged the whole statement to be agreeable to fact; objecting to nothing, but the charge for medical services, which the commissioners considered just and equitable. He declared himself ready to account for his subsequent

2. If an Executor or Administrator sell the slaves of his testator or intestate, by private contract for ready money, he ought to be charged therefor such sum as they would have sold for upon a reasonable credit, if the situation of the estate would admit of such credit: and, if not, such a sum as they would have sold for, in cash, at public auction.

3. A purchase, by an Executor or Administrator of any part of the estate of his testator or intestate, when other persons were deterred from bidding in consequence of doubts concerning the title, suggested by himself, whereby he obtained the property for less than its value, ought to be annulled by a Court of Equity.

transactions ; but admitted that, if the complainant could point out *any thing* fraudulent, unjust, or untrue in that account, he was ready to settle it over again ; but he trusted that the Court would not put him to the trouble of a re-settlement, without the *suggestion and proof of something* improper and illegal in his conduct.

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nistrater.

Many depositions were taken on both sides, from which it appeared that the medical account, to which the plaintiffs objected, had not been improperly allowed ; that the repairs and additions to the barn were *commenced*, upon the scale contemplated by the defendant, with the *consent* of the widow ; when all the timbers had been procured, and the work was far advanced, she made objections, and wished it to be relinquished. The testimony, concerning the utility and propriety of those additions, was doubtful. It was also proved, that the defendant sold, to sundry persons, by private bargains, five negro men belonging to the estate, for 525*l. cash*, being less than could have been got for them on the same terms, at public auction ; that he also sold at auction three boys, and himself became the purchaser, for 170*l. 10s. 0d.* ; other persons having been prevented from bidding, by doubts concerning the title, *suggested by himself*.

A commissioner, (to whom the account was again referred by an order made in the cause,) reported, September 28, 1800, that he had carefully examined the Bill, Answer and Exhibits, and found the plaintiffs justly indebted to the defendant in the sums of 7*l. 3s. 7½d.* principal, and 8*l. 10s. 7d.* interest, calculated up to the 25th of September, 1800. In coming to this conclusion, he made no alteration in the account reported by the former commissioners, in which, after examining attentively the accounts and vouchers, together with the depositions of the two surviving commissioners, he could find no error, and therefore only stated the subsequent transactions.

To this report the plaintiffs filed exceptions : 1st, that, upon the evidence, the repairs and additions to the barn ought not to have been allowed : 2dly, that the defendant should have been charged more than 525*l.*, for the five negro men ; since it appeared in evidence that they were worth 670*l.* and would have sold, to the highest bidder, for much more ; and he had not pursued, in the sale, the law for regulating the conduct of

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executors and administrators, nor taken that course which a prudent man would have adopted to obtain the best price, or the real value of the negroes: 3dly, that the sale of three negro boys, made in March, 1803, for the sum of 179*l.* 10*s.* 0*d.*, ought not to be confirmed; it being in proof that the defendant bought them himself, and at a very reduced price, after deterring others from bidding, by exciting doubts as to his right to sell, on account of want of title in his testator, whose right to the slaves in question was in fact indisputable: and 4thly, that the commissioner had improperly allowed the defendant (by confirming the former account,) the sum of 7*l.* 17*s.* 4*d.*, for certain plains (for negro clothing) purchased in 1802, of *James Robertson, jr.*, "when it was *proved* that they were damaged, "and of *no value*, and the defendant bought them of *Robertson*, "knowing their quality, in order to discount a debt due him "from said *Robertson*." (1)

The County Court sustained the first exception, and accordingly disallowed the defendant the sum of 107*l.* 5*s.* 11½*d.*, charged for repairs and additions to the barn; and, considering that the commissioner ought to have allowed the plaintiffs the real value of the negroes, mentioned in the second exception, ordered that the sum of 155*l.* be added to the sum allowed by the commissioner for the said negroes, and be charged to the defendant. It also set aside and annulled the sale of the slaves mentioned in the third exception, and decreed that the defendant deliver to the plaintiffs the last mentioned slaves, or such of them as were alive; and *overruled the 4th exception*.

Upon an appeal by the defendant to the Superior Court of Chancery for the Richmond District, this decree was reversed, and another pronounced, in conformity with the report of the commissioner, dated September 28th, 1809, that the plaintiffs pay to the defendant the sum of 15*l.* 14*s.* 2½*d.*, with interest on 7*l.* 3*s.* 7½*d.*, part thereof, from the 25th of September, 1809, until paid, and his costs: whereupon they appealed to this Court.

(1) Note. It was proved that the plains were *damaged*, and that the overseer, on that account, considered them of no value; and objected to receiving them; but the negroes were clothed with them, and possibly they might have been worth what was given for them by the administrator.

Friday, October 25th, 1816, Judge ROANE pronounced the Court's opinion, as follows:—

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istrator.

The Court being of opinion that the Appellant Mrs. *Hudson* consented to the repairs made upon the barn in the proceedings mentioned, is farther of opinion that the sum expended thereupon by the Appellee should be allowed him, to be paid by Mrs. *Hudson* as tenant for life of the premises, except such part thereof as may be deemed adequate to reasonable repairs upon the same, which should be allowed to him in his account as administrator.

The Court is farther of opinion that, instead of the charge of five hundred and twenty-five pounds, for which five negro fellows were sold by the Appellee at private sales, he ought to have been charged therefor such a sum as the same would have sold for upon a reasonable credit, if (in the opinion of the Court of Chancery) the situation of the estate would admit of such credit; and, if not, that he should be charged with such a sum as the same would have sold for in cash, *at public auction*.

The Court is also of opinion, that the purchase of the three negro boys in the proceedings mentioned, having been made by the Appellee, under circumstances on his part which tended to deter others from purchasing them, and caused him to get them for less than their value, ought to be set aside in favour of the estate, and the Appellee charged with their hires. Therefore, it is decreed and ordered, that so much of the said decree as conflicts with this opinion be reversed and annulled, and the residue thereof affirmed; and that the cause be remanded, to be finally proceeded in pursuant to the principles of this decree.

Wilkins against Woodfin Administrator of Pearce. Decided, Oct. 28th, 1816.

JOHN L. WILKINS filed his Bill in the Superior Court of Chancery for the Richmond District against Samuel Pearce, to

1. A Court of
Equity has juris-
diction to decrees
the repayment
of money paid

by mistake; notwithstanding the plaintiff's remedy by *assumpsit* for money had and received. (1)

2. An evasive answer, (though not excepted to as such,) outweighed by the testimony of one witness, and circumstances. * See *Maspin. v. Whiting*, 1 Call 224; and *Pryor v. Adams*, *Ibid* 390.

(1) Note. In this case, the bill did not pray a *discovery*, nor set forth any ground for the jurisdiction of the Court of Equity, but the *mistake*.

CORONA,
1816.

Wilkins
v.
Woodin, &c.

be relieved against a mistake, which he alleged had occurred to his prejudice in an exchange of bonds, and shewed by an account stated. The defendant by his answer said, that the statement of the complainant, "*as made in the bill, was not true;*" and went on to state the transaction differently in some respects; but *evaded*, (without expressly denying,) the charge of the mistake. He also pleaded to the *jurisdiction* of the Court; alleging that the plaintiff's remedy, if he had any, was at law. The defendant's acknowledgment that a mistake had been committed was proved by the evidence of one witness. Chancellor TAYLOR, on hearing the cause, dismissed the bill, will costs, from which decree the complainant appealed.

Monday, October 28th, 1816, Judge BROOKE pronounced the following opinion of the Court:—

The Court is of opinion that the deposition of one witness, aided by the circumstances in this case, outweighs the answer of the defendant. The bill alleges that, in an exchange of bonds, a mistake was made in the calculation, to the prejudice of the Appellant, ninety-six pounds, four shillings and two pence. The defendant, not positively denying that allegation, evades it by stating that the bonds referred to in the bill were offered to him by the Appellant, and that he accepted them. The account, which is set out in the bill, discloses the fact that he was credited ninety-six pounds, four shillings and two pence more (including the thirty-nine pounds, fourteen shillings and four pence, claimed by the Appellant, as compensation for the exchange,) than the Appellant; yet he omits to notice it in his answer, and only insists, that *he* was to have a reasonable advantage in the exchange. That ninety-six pounds, four shillings and two pence was a reasonable advantage, is not pretended, and is a result totally inconsistent with the defendant's own account of the circumstances that preceded the exchange. If the deposition is let in, no doubt can remain. The witness deposes that the defendant admitted that he discovered the mistake before he left the Appellant's house; that he saw the account, and discovered the mistake before the Appellant; and that he would not inform him of it, because the Appellant had treated him ill. On these grounds the said decree is erroneous. The same is therefore reversed, with costs. And

this Court proceeding &c. it is farther decreed and ordered that the Appellee, out of the estate of his said intestate in his hands to be administered, do pay to the Appellant ninety-six pounds four shillings and two pence, with interest thereon, to be computed after the rate of six per centum per annum, from the 7th day of December, 1807, until payment, and also his costs by him in the said Court of Chancery expended.

Overses,
1816.

Wittins
v.
Woodin, &c.

Graham against Hendren.

Decided, Oct.
29th, 1816.

ON the 6th day of August, 1811, an agreement was reduced to writing, between *Thomas Taylor* of the city of Richmond, (who acted in behalf of *John Graham*,) and *Patrick Hendren* of the county of Charles city, stating that *Taylor* had purchased of *Hendren* "a tract of land in the state of Ohio, containing twelve hundred acres, more or less, at three dollars per acre." The land was described as situate "near the town of Williamsburg, and as the same land that was patented in the name of Col. *Holt Richardson* of King William county lately deceased." Eighteen hundred dollars of the purchase money were to be paid when a complete title was ready to be made by the said *Hendren*; and the balance in three equal six months' installments.

1. Where it appears that, at the time of entering into a contract for sale of a tract of land, there was a misunderstanding between the parties, as to the identity of the land, to which the contract related, a Court of Equity, in its discretion, ought not to interfere by decreeing a specific performance. See *Calverley v. Williams*, 1 Vesey, jr. 211.

A Bill was filed by *Hendren*, in the Superior Court of Chancery for the Richmond district, against *Taylor* and *Graham*, offering to make a conveyance of three surveys of land, containing four hundred acres each, which lay in the neighbourhood of Williamsburg, adjoining each other, and therefore might properly be considered as one tract. He alleged that Col. *Richardson* had the tract, containing twelve hundred acres, divided into three equal lots of four hundred acres each, for the purpose of selling to emigrant purchasers; "but that tract was the only one, the said *Richardson* ever owned in the State of Ohio, and the only one, that his heirs had at that time, or since;" that the said land, being divided into three lots, was made a pretence by *Taylor* and *Graham* to avoid a fair and honorable contract, upon the false allegation that it was not the same tract of land which *Taylor* had purchased of *Hendren*. He

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therefore prayed a decree to compel a specific performance of the agreement.

The defendant *Graham*, in his answer, said that *Walter Dunn* of the State of Ohio was jointly interested with himself in the purchase, and *ought to be a party* to the suit: that the lands, which *Hendren* offered to convey were not the tract, which they intended to purchase, and understood him as agreeing to convey; that in truth there were four other tracts, in the same neighbourhood, also held by the same Col. *Richardson*; one of which was originally surveyed for twelve hundred acres, and was greatly superior in value to the three surveys of four hundred acres each; which tract was known by the name of the twelve hundred acre tract, though it had been reduced to eleven hundred and fifty acres, in consequence of a loss occasioned by an interfering survey; and that this was the tract in contemplation of the parties, when the contract was made. This allegation was supported by the answer of *Taylor*, who declared himself to have been an *agent* only, without any interest in the controversy, or compensation for his agency.

Chancellor TAYLOR ("being of opinion that the agreement " in the proceedings mentioned ought to be specifically performed, and the defendant *John Graham* having in his answer " declared his readiness to perform it, if such should be the " Court's opinion.) decreed that, on the plaintiff's depositing " with the Clerk of the Court, a good and sufficient deed, with " general warranty, for the tract of land in the Bill and agreement " mentioned, to be delivered to the said *John Graham* on his " making the payment herein after mentioned, the said " *John Graham* do pay unto the plaintiff the sum of three thousand and six hundred dollars, with interest on eighteen hundred " dollars, part thereof from the 4th day of December, 1811, " until paid, on the farther sum of six hundred dollars from the " 4th of June, 1812; on the farther sum of six hundred dollars " from the 4th of December, 1812; and on the farther sum of " six hundred dollars from the 4th of June, 1813, until paid, " and his costs:"—from which decree *Graham* appealed.

Call and *Williams* for the Appellant.

Wickham for the Appellee.

Tuesday, October 20th, 1816. Judge ROANE pronounced the Court's opinion; that, upon the testimony, there was such a misunderstanding between the parties, at the time of entering into the written contract in the proceedings contained, as to the identity of the land, to which that contract relates, that a Court of Equity ought not, in its discretion, to interfere by decreeing a specific performance. The Court is also of opinion that *Walter Dunn* ought to have been a party to the Appellee's Bill; but, as he was not made a party by him, after his interest was fully disclosed by the answers; as, from the case, as it now appears, the Appellee has no right to a decree against him, if he were before us; and as, generally, the adding of other defendants is in favour of those who were originally convened; the Court does not think it proper to retain the cause for the purpose of making *Dunn* a party. The decree is therefore reversed, with costs, and the Bill dismissed.

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1816.

Graham
v.
Hendren.

West against Belches.

Decided, Oct.
30th, 1816.

THE Appellee *James Belches* filed his Bill in the Superior Court of Chancery for the Williamsburg district against *Robert West*, *Thomas West*, and *Morgan Tomkies*; stating that the complainant and *Francis Willis* were securities for *Charles Grymes*, in two bonds, to the said *Tomkies*; one for 150*l.*, and the other for 82*l.* 10*s.* 0*d.*; that the bonds were usurious, a loan of money at unlawful interest being intended by the parties, but

1. That slaves were sold, on a credit, for more than a sum, which the seller had previously offered to take for them in cash, with interest thereon during the term of credit, and that the seller was accustomed to lend money on usurious interest, is not sufficient evidence that such sale was intended as a cover for usury; there being no proof that a loan of money was intended by the parties.

2. An Injunction of a Court of Chancery inhibiting a defendant, and all other persons, from selling certain slaves until the farther order of the Court, is conclusive, while in force, to prevent their being lawfully sold to satisfy an Execution against him, even in favour of a person not a party to the suit in Chancery.

3. To prevent circuity of action, and attain the ends of natural justice, a Court of Equity will completely indemnify one of the sureties in a bond, by means of a *lien*, on the property of the principal obligor, existing in favour of the other surety; notwithstanding he has himself relinquished a *lien*, on the same property, originally created for his indemnification. And, for this purpose, the Court will compel the creditor (all the parties interested being before it,) to resort to that property, in the first place, for satisfaction of his debt.

4. It is no objection to a decree that it is *nominally* in favour of one defendant against another, if it be *substantially* in favour of the complainant.

O'Connor,
1816.


West
v.
Belcher.

the usury covered by a sale of slaves for much more than their value; that the bond for 1804 was assigned by *Tomkies* to *Robert West*, who was concerned with him in the usury; that suits being brought, judgments were confessed, on both bonds, by *Grymes*, but not by the securities; that, afterwards, the said *Morgan Tomkies* procured a deed from *Grymes*, conveying all his property, both real and personal, to *Jasper Hughes* and *William Camp*, in trust, for the payment of certain debts of his, among which were the two debts above mentioned; that the identical negroes, Peter and Molly, for which the said bonds were given, were included in that deed; previous to the execution of which, the said *Grymes* had made over to the complainant and the said *Francis Willis* the same negroes Peter and Molly, to indemnify them on account of their becoming his securities in the said bonds; which conveyance was destroyed, and the said two negroes' names were inserted in the deed of trust to *Hughes* and *Camp*, (part of the original of which was written by the Complainant, and part by the said *Tomkies*,) under an idea that the complainant was entirely exonerated from any responsibility for the said debts, or any part of them; that, after the execution of the said deed of trust, the said *Tomkies* declared himself perfectly satisfied with the property thereby conveyed, as he knew it was sufficient to satisfy all the claims; and that in fact the same was much more than sufficient; that the complainant, finding afterwards, that the suit, which *West* had brought on the bond assigned him, had not been dismissed as to the securities, pleaded the act of usury, and was then ready to substantiate the said plea by the evidence of *Dr. John Willis*; but the plaintiff's counsel would not then go to trial, and the cause was continued, on leave given to file the said plea; that, some time after this, *Dr. Willis* having removed to the city of Washington, and the complainant not being able in time to obtain his deposition, he was ruled to trial, and having no evidence to support his plea, a verdict and judgment were obtained against him and *Francis Willis*; that execution was levied on the property of the complainant only, by *Thomas West*, a deputy sheriff, who was brother of the plaintiff *Robert*; that he took from the plantation of the complainant three negroes, to wit, Mingo and John, two valuable young men, and Celia a girl, who, together with other

slaves, had been given him by his father, on condition of his paying certain debts; that *David Ross*, attorney in fact for *Blackburn* and *Syme* and others, trustees for *James Dunlop*, had instituted a suit in the High Court of Chancery, and obtained an Injunction inhibiting him, and all other persons, from selling or conveying away any of the said slaves, and the sub-pœna of Injunction was regularly served upon him; that he attended at Gloucester Court House on the day advertised for the sale of the said negroes, and forbade the deputy sheriffs, then present, (who were fully apprised of these facts) from proceeding to sell; but that *Thomas West*, being indemnified by *Robert*, proceeded to make the sale; and thereupon the slaves were bought by *Robert*, (*the only bidder*.) for the sum of four hundred dollars, although either of the men was worth that sum, exclusive of the girl who was worth one hundred dollars. The complainant therefore prayed an injunction to stay all proceedings on the judgment, a decree for restitution of the slaves, and "all and every relief which the hardship of his case might require."

Oceana,
1818.

West
v.
Bolcher.

The defendant *Robert West* answered, denying all connexion with *Tomkies* in the original transaction, and all knowledge of any usury; and stating that the bond was assigned him for a valuable consideration; that the plea of usury was fairly tried, and the defendant might have taken the deposition of his witness, having obtained a commission, but neglected it; that the deed of trust was executed without his privity, and after the debt was assigned him, and that he had derived no benefit therefrom; that the sale under the execution was fair, and nothing done to oppress the complainant, who forbade the sale, but showed no authority for so doing; that the respondent could not admit his statement, unless supported by the record; that his interference probably hurt the sale, and that he was warned of it at the time.

The defendant *Tomkies* answered, denying all usury, and averring that the sale by him to *Grymes* of the negroes *Peter* and *Molly* had no connexion with a loan, and was for a higher price, because on credit; that the object of that sale was to pay a debt payable in bonds; that he would not have taken less for them from any person on credit; and that they sold at a fair credit price. He denied all connexion with *West* in the

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v.
Belches.

original transaction, or in any usurious dealing; and stated that the assignment of the bond to *West* was *bona fide*; that the deed of trust was executed after that assignment, and without the privity of *West*; and that the property conveyed by it had been applied to other objects. The defendant acknowledged "that he believed that the complainant and *Willis* did take a deed of trust, on the said slaves, in order to secure themselves; in "which this defendant had no interest." He admitted, too, that at the date of the deed of trust to *Camp* and *Hughes*, (which was also made to indemnify the complainant and *Willis*, and a certain *Meaux Thornton*, who had also become security for *Grymes* to a large amount,) he did suppose that the property thereby conveyed would have been sufficient, from the high value of the Kentucky land, as represented by the complainant himself; "but he denied that he ever on that account released, or "intended to release the said *Belches* and *Willis*, or *Thornton*, "from their securityship aforesaid." He stated that the Kentucky land had been sold under the said conveyance for only sixty-five pounds, or thereabouts; that the slaves *Peter* and *Molly* had also been sold by the trustees for one hundred pounds, or thereabouts, and purchased by himself; and that he had applied the amount of the sale of the said land and slaves, in equal proportions, to the credit of three judgments in his favour, one of which was that against *Grymes* and the complainant, on the bond for eighty-two pounds, and ten shillings.

Thomas West, the deputy sheriff, answered, alleging that the sale which he made was "perfectly fair, and the slaves, would "probably have sold for more, had not the complainant himself "forbid the sale, pretending, as this defendant understood, that "the same were not his property, but did not show this defendant any proof of such his assertions."

John Willis, a witness for the complainant, deposed that *Tomkies* offered him two negroes named *Peter* and *Molly* for six hundred dollars; afterwards for five hundred and fifty dollars; and, being refused by the deponent, he thinks they were then offered, to him for five hundred dollars, "payable on this deponent's return from Baltimore with the sales of his grain;" which was also refused by this deponent; that, hearing afterwards that *Tomkies* had sold them to *Grymes* for two hundred and thirty pounds, he told him it was a good price; when

Tomkies observed, " it was only the difference of the *per centum*, alluding, (as the deponent understood) to the usurious " ratio of interest at which the said *Tomkies* was accustomed " to lend money;" that the deponent had borrowed money on usurious interest from *Tomkies*, and had been told by him that he and *Robert West* were concerned together in usurious transactions; that the deponent was summoned by *Belches* on the trial of his plea of usury; but, for some cause, the suit was not tried at that time.

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v.
Belches.

Sundry witnesses for the complainant or defendants, proved that *Belches* forbade the sale of the negroes on *West's* Execution, and held a paper which he said was "an *Injunction Bill*" prohibiting their being sold, which paper was not read; that he was warned that his forbidding the sale would injure it, but persisted; that *West* was the only bidder, though ten or a dozen persons were present, and others were at dinner, in the tavern, within hearing of the deputy sheriff who cried the property, and the sale was on a public day; and that the value of the slaves was considerably more than the sum for which they were sold.

The record was exhibited of the suit in Chancery, in favour of *Blackburn* and *Syme*, trustees of *James Dunlop*, by *David Ross* their attorney in fact, against *Belches* and others; from which it appeared that the *Injunction*, relied upon in the bill in this case, was awarded, by Chancellor *WYTHE*, on the 8th of May, 1801.

The Court of Chancery directed an account of the profits of the slaves, bought by *West* from the 18th of December, 1802, which was the day of sale; and also of the amount of his judgment, with interest, and costs.

The commissioner made a report, stating the profits of the slaves, for nine years and upwards, to exceed the judgment by eighty-three dollars and fifty cents. And, at the hearing, the Court decreed that *West* should restore the slaves *Mingo*, *John* and *Celia*, and pay the eighty-three dollars and fifty cents; and, being of opinion that the contract with *Tomkies* was usurious to the amount of the bond for eighty-two pounds and ten shillings retained by him, directed him to account for the monies received in part payment of that bond.

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West
v.
Bailew.

West appealed to this Court.

Wickham for the Appellant.

Nicholas and *Wirt* for the Appellee.

Wednesday, October 30th, 1816. Judge ROANE pronounced the following opinion of the Court.

The Court is of opinion that, upon the testimony exhibited in this cause, there is no ground to say that the sale of the negroes Peter and Molly in the Bill mentioned was a transaction to cover a reservation of usurious interest upon a loan of money;—but that, for aught that appears, the said sale was a real sale of the said negroes upon a credit; in which case it is lawful to agree upon and take a greater price than that, with interest, for which they had been previously offered in cash; and that, consequently, there is no ground to impeach the Judgment now sought to be enjoined.

But the Court is of opinion that the sale of the Appellee's negroes Mingo, John, and Celia, and the purchase of them by the Appellant, was made under circumstances which ought to invalidate the same. It is in full proof that the Appellee stated at the time of the sale that he had an Injunction from the Court of Chancery, by which all persons were inhibited from selling the said slaves; that he offered to exhibit the same in full, and establish the identity of the negroes in relation to those mentioned in the said Injunction Bill; and that it was only owing to the conduct of the Appellant, and his brother the Deputy Sheriff that this was not done. In this transaction the conduct of the Appellee was entirely correct, as he acted in obedience to the decree of a competent Court, then admitted by the Appellant to have been in existence, whereas the Appellant and the said Sheriff acted in contempt thereof. As to what is said of the said Injunction not binding the right of the Appellant, as he was no party to the suit, in which it was obtained; while this is admitted, it only means that he is not inhibited from asserting that right by a suit or proceeding, to which he is a party. While the Injunction, however, is in force, it is conclusive that the Appellee had no right in the said slaves which could *at that time* be lawfully

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sold to satisfy the execution against him. A sale of his interest therein, at that time, and under those circumstances, would unavoidably sacrifice that interest, if it should be afterwards found that he had any; and would be to consider that, as his property, which, under an existing decree, must be considered as the property of, or as liable to satisfy the claims of others. The result of the sale before us is a commentary upon the doctrine thus laid down. All other persons except the Appellant were prevented, by the course adopted by him, from buying as Belcher's property, the negroes in question, and they were consequently sold for considerably less than their value. The sale therefore ought not to stand, but the Appellant be decreed to deliver up the said negroes and their increase to the Appellee, and pay to him the amount of their hires.

Here the Decree might end, were it not that the Appellant has got a Judgment against the Appellee and *Francis Willis*, and may proceed against him or them for satisfaction thereof; and if it now appears to the Court that there is some specific property bound for the payment of the Appellant's debt, that property ought to be subjected to pay it in the first instance. The Appellee alleges in his Bill that, prior to the execution of the Trust Deed to *Hughes* and *Camp*, contained in the proceedings, *Charles Grymes* had made over to him and *Francis Willis* (his Co-security) the said negroes *Peter* and *Molly*, to indemnify them for their securityship in the bond in question; and the defendant *Tomkies*, in his answer, admits, that "he believes the Appellee and *Willis* did take the said Deed" for the purpose aforesaid. Admitting, (on which, however, the Court gives no opinion,) that the Appellee consented that, upon the execution of the Deed to *Hughes* and *Camp*, his own lien on the negroes *Peter* and *Molly* by virtue of the previous Deed to him and *Willis* should be released, he did not release it, nor was he competent to release it, as it relates to *Willis*, who was no party to that transaction. As to *Willis*, therefore, at least, the said Deed is still in full force; and if it were in fact destroyed, as is stated by the Appellee in his bill, under the supposition therein also mentioned, it would be set up as to *Willis* in a Court of Equity: but the necessity of that proceeding is prevented by the admission of the said

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Tomkies as aforesaid. That Deed, as to *Willis*, will therefore be considered as if it were now before the Court.

The Court is of opinion, that, even if *Willis* had been no party to the Judgment now sought to be enjoined, nor to the execution, it would be competent to the Appellee, after paying off the same, to resort to him as a co-security for contribution of a moiety thereof; and that, for the purpose of preventing circuitry, and getting payment out of the proper fund, it would be also competent to him, as standing in the place of *Willis*, to go for the said moiety against the negroes conveyed by the said Deed.

The Court is also farther of opinion that, under that hypothesis, it would be competent to the Appellee to stand in the place of *Willis*, and charge the said negroes for the whole sum. Nothing is more consonant to natural Justice, than that the proper debts of every man should be paid out of his own estate, in case of innocent securities, and that that property of his, in particular, should be subjected, which has been bound thereto by a specific and existing lien. These principles will avail the present Appellee, supposing him to have released for himself *his own* proper lien created by the first deed. In the case of *Eppes Executor of Wayles v. Randolph*. 2 Call 125. *Randolph*, by a Bond, to which *Wayles* was his surety, bound himself and his heirs to *Bevins*. *Randolph* became insolvent as to his personal estate, and *Bevins* got a decree, for payment of the Bond, against *Wayles's* representatives, who paid the same. *Wayles's* representatives, on these facts being manifested to the Court, were permitted to stand in the place of *Bevins*; be considered as Bond Creditors; and charge the Lands of *Randolph* in the hands of his heirs, on which they had *themselves* no lien. The principles of this decision go to charge the negroes conveyed by the Deed to the Appellee; and, as all the parties concerned in interest are now before the Court, may be applied in favour of the Appellee *Belches*. That view of the case is, however, much strengthened, when it is considered that the Judgment in Gloucester Court was also rendered against *Willis*, and the Execution was issued also against him, though it was only levied upon the property of the Appellee.

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It is but a small boon to ask for a security that he shall make the property of his principal, which is bound by a specific and existing *lien*, liable, in exoneration of his own, in the same manner as it would have been, if the execution had been levied upon the property of his co-security in the first instance. The Court is therefore of opinion, that the Appellant should be decreed to resort to the negroes *Peter* and *Molly* and their increase, (which were purchased by *Tomkies* from the Trustees *Hughes* and *Camp*.) for the payment of his debt and interest; that, in the event of payment not being made by *Tomkies* within a short and given day, the said negroes should be sold to satisfy the same; that, if the said *Tomkies* should have sold the said slaves, or any of them, he or his representatives should be decreed to pay the amount thereof in exoneration of his *bona fide* alienees; that, in the case of the insolvency of him, or his estate, for such amount, in the whole or in part, the Appellant shall be at liberty to seek satisfaction from the said negroes and their increase, in whose hands soever they may be, by a suit or proceeding, to which the respective holders and the Appellee are parties; and that the Appellant should only be at liberty to resort to the proper goods of the Appellee for such part of his debt and interest, if any, as may remain unpaid from the several sources above-mentioned. It is no objection to this decree, that it is *nominally* in favour of one *defendant*, and against another; for it is *substantially* a decree in favour of the plaintiff, (*Belches*.) who thereby exonerates his own estate. Therefore it is decreed and ordered, that so much of the decree of the said Court of Chancery, as conforms to the principles of this Decree be affirmed; and that so much of it, as conflicts therewith be reversed and annulled; and also that the Appellant pay unto the Appellees, being the parties substantially prevailing, their costs by them about their defence in this behalf expended. And it is ordered that the cause be remanded to the said Court of Chancery, to be finally proceeded in pursuant to the principles of this decree.

Decided Nov.
1st, 1846.

Ellis against Turner's Administrator.

In *Assumpsit*, **THIS** was an action of *Assumpsit* in behalf of *Thomas Ellis* against *George Turner's* Administrator, in the County Court of Caroline.

The Declaration contained three Counts. The first alleged a mutual parol submission to arbitration of certain matters in controversy between the plaintiff and *George Turner*, with an agreement that the award should be binding upon both parties, and set forth an award, "of which the said *Turner* had notice," (1) but *did not set forth a promise, thereupon*, that he would pay the money awarded: (2) the second and third Counts were for money had and received, and a balance stated to be due upon an *insimul computassent*. The breach of promise averred was in the following words: "Nevertheless the said Intestate in his life time, and the said *Rouben* since his death, not regarding his several promises aforesaid, but contriving to defraud the said *Thomas* in this behalf, hath not paid the said sum of money, or any part thereof, but the same to pay the said Intestate in his life time, and the said *Rouben* since his death, hitherto hath refused, and the said *Rouben* still doth refuse to pay the same."

The defendant, having pleaded *non assumpsit*, and being afterwards permitted by the Court to plead the Act of Limitations, on both which pleas issues were joined, at a subsequent term a Jury was empannelled to try "the issue" joined, a verdict was found, and Judgment entered for the plaintiff, which was reversed by the District Court of Fredericksburg; because it did not appear that the issue, joined upon the plea of the Act of Limitations, had been tried. The cause, being

(1) Note. This averment was unnecessary; for one party is as much bound to take notice of the award, as the other, unless the stipulation be that the award shall be notified to the parties; in which case notice must be averred. 2 *Saund.* 62 a. note (4).

(2) Note. In the form of the declaration, in 2 *Chitty*, p. 80, mutual promises "to perform the award to be so made" are set forth; but, after stating the award, there is no farther averment of a promise on the part of the defendant "to perform the award so made." In 11 *Mod.* 170. *Lupart v. Welson*, it is said that the mutual submission implies mutual promises to observe the award.

remanded for a new trial, the defendant filed a Demurrer to the plaintiff's evidence, which was therefore spread on the record, and appeared applicable only to the first Count in the Declaration.

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nistrator.

The County Court was of opinion that, upon the Demurrer to evidence, the law was for the defendant, and gave judgment accordingly. Upon an appeal the Superior Court of law affirmed this judgment, upon the ground, "that though the evidence in the Demurrer consisted substantially with the first Count of the Declaration, yet that Count was utterly insufficient to ground a judgment on in favour of the plaintiff."

To this Judgment a Writ of *Supersedeas* was awarded by this Court.

November 1st, 1816, the President pronounced the Court's opinion:—

The Court, not deciding whether the Declaration in this case, in the first Count thereof, is defective or not, in not averring a promise by the defendant *George Turner* to pay the sums, stated to have been awarded against him, is of opinion that the same is insufficient to maintain the action, in this; that, for any thing therein shewn, the said sums may have been paid by the defendant *George Turner*, there being no averment to the contrary. On this ground, and not on that, assigned by the County Court in rendering its last judgment, as the ground thereof, (on which the Court gives no opinion,) the judgment of the Superior Court, affirming that of the County Court with costs, is affirmed.

Miller against Blannerhassett.

Decided Friday
Nov. 1st, 1816.

IN this case, *Miller* obtained a Judgment against *Blannerhassett* in the County Court of Wood. A writ of *Supersedeas* to that Judgment was awarded by the Superior Court of law, whereupon the Bond for prosecuting the *Supersedeas* was exe-

1. A Bond for prosecuting a Writ of *Supersedeas* being executed by a Surety only, without any

principal obligor, is insufficient; and a *Supersedeas* issued thereupon ought to be quashed.

See *Rootes v. Holliday et al.* 4 *Munf.* 323.

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cuted by a *Surety*, but not by *Blannerhassett*, or any other principal obligor in his place. The Superior Court having reversed the Judgment, *Miller* appealed to this Court, where, after argument, it was decided that the Judgment of the Superior Court was erroneous, because that Court had no cognizance of the case, the *Supersedeas* having been improvidently issued; since the Bond was not signed by *Blannerhassett*, or any responsible person for him.

Judgment reversed, and the Writ of *Supersedeas*, issued by the Superior Court of law, directed to be quashed.

Decided Nov.
9th, 1816.

Nicholson against Dixon's heir.

1. In Debt on a bond, in behalf of the survivor of two joint assignees, a declaration, charging that the defendant has not paid the debt to the obligee, or to the plaintiff, without averring, also, that he did not pay it to the other assignee in his life time, is a demurrer.

THE Appellant *John Nicholson*, as surviving partner of *John and Joshua Nicholson*, who were assignees of *Robert Matthews*, brought an action of Debt against *John Dixon*, heir and devisee of *John Dixon* deceased. Upon a general Demurrer to the declaration, the Superior Court of law entered judgment for the defendant, to which a Writ of *Supersedeas* was awarded.

November 9th 1816, Judge ROANE pronounced the following opinion of this Court :—

"The Court is of opinion, that the declaration in this case is insufficient to warrant a Judgment on behalf of the present Appellant, in this; that it only avers a non-payment of the debt sued for to *Robert Matthews* the obligee, and to the plaintiff, but does not aver a non-payment to *John and Joshua Nicholson* the immediate assignees of the said *Matthews*, or either of them, during the life of the said *Joshua*, which *Joshua*, the Appellant, is stated to have survived: and although, in point of law, a payment to either of them, during the life of *Joshua*, may have been considered as a payment to the plaintiff, and so have satisfied the terms of the averment last mentioned, the Court is of opinion that an averment of this character is not sufficient, under several decisions of this Court, and particularly that in the case of *Buckner v. Blair*, June 1811. (1) On this ground the Judgment is affirmed.

(1) Note. See 2 *Munf.* 336; also *Brazton's adm'r. v. Lipscomb*, *Ibid.* 223; *Green v. Dulany*, *Ibid.* 518; and *Norvell v. Hudgins*, 4 *Munf.* 496.

Hollingsworths against Dunbar.

Decided Nov.
7th, 1816.

THIS was an action of *Covenant*, brought by the Appellants against the Appellee in the Superior Court of law for Stafford County, upon an Indenture made the 3d of March 1803, between *Francis Thornton* and *Sarah* his wife, and *Robert Dunbar* and *Elizabeth* his wife, of the one part, and *Levi, John* and *William Hollingsworths*, of the other part; by which the said *Thornton* and wife, and *Dunbar* and wife, in consideration of the sum of five thousand dollars, bargained and sold to the said *Hollingsworths* a certain Mill seat on *Rappahannock River*, containing an acre and a half of land, by certain metes and bounds, "together with the necessary right of taking water by a race or canal, to be cut from the lower end of the forebay at *Thornton* and *Dunbar's* present grist mill pond, to the Mill seat so intended to be sold and conveyed; which race is to be of sufficient width and depth to convey water for at least five over-shot wheels, and from the said Mill seat to the River, not to exceed eighteen feet in width at the bottom under the reservations, restrictions and covenants in certain articles of agreement in this Indenture recited; as also the water necessary for the said *Hollingsworths* to turn two water wheels, to be taken from the grist mill pond of the said *Thornton* and *Dunbar*, therein also intended to be bargained and sold, sufficient to work two water wheels with four pair of mill stones, not to exceed six feet in diameter, and the necessary machinery usually used for making and bolting flour, cleaning and screening wheat and corn; provided there shall be first a sufficient quantity of water for the grist mill of the said *Thornton* and *Dunbar* upon the present construction, or the same quantity, to be used conformably to the said agreement:" and the said *Thornton* and *Dunbar*, and each of them, for themselves, their heirs, &c. did covenant, promise and agree to and with the said *Hollingsworths*, that they the said *Thornton* and *Dunbar*, and each of them, &c. "the aforesaid acre and a half of ground Mill seat and necessary right of taking water by a race or ca-

1. Where the extent of the plaintiff's right under the covenant depends, in part, upon extrinsic testimony, the Court ought not to instruct the Jury, "that if, upon the said evidence, they shall be of opinion that certain facts are established, then the defendant has broken his Covenant as charged in the declaration;"

for it is not competent to the Court to say whether such facts are sufficient, or not, to warrant such conclusion, unless the sufficiency thereof had been duly submitted to its Judgment by a demurrer to the evidence (1)

2. The breach of Covenant charged in the declaration being that, during a specified period of time, the defendant deprived the plaintiff of the water necessary for his mill, by diverting it therefrom, and suffering it to be diverted by others, the plaintiff is not limited in proving acts committed by the de-

fendant or other persons, to the period stated in the declaration; but may prove previous acts, in consequence of which the injury was sustained during that time.

(1) Note. That a Bill of exceptions cannot have the effect of a demurrer to evidence, see *Keel et al. v. Herbert*, 1 Wash. 203, and *Wroe v. Washington*, &c. *Ibid.* 362.

NOVEMBER, "nal to convey the water to and from the said Mill seat, water,
1816. "privileges, &c. to them the said Hollingsworths and their heirs
Hollingsworths "and assigns, should and would warrant and forever defend,
v. "against the claim or claims of all person or persons whatsoever."
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The breach stated in the declaration was, that the defendant, "during the time, between the 27th day of September 1806, and the 27th of November in the same year, did prevent, hinder and deprive the plaintiffs from the water necessary for them to turn two water wheels, to be taken from the grist mill pond of Thornton and Dunbar in the said indenture mentioned, sufficient to work two water wheels with four pair of mill stones, not to exceed six feet in diameter, and the necessary machinery usually used for making and bolting flour, cleaning and screening wheat and corn;—*although there was sufficient therefor, under the proviso that there should first be a sufficient quantity of water for the grist mill of the said Thornton and Dunbar upon its then construction; but the said defendant diverted the said sufficient quantity of water, so sold to the plaintiffs, and suffered the same to be diverted by others, from their the said plaintiffs mill, during the period aforesaid.*"

The defendant pleaded not guilty, and covenants performed, and issues were joined.

At the trial the plaintiffs gave in evidence the indenture on which the action was brought; and a Record of the County Court of Spottsylvania, shewing that leave was given the plaintiffs, on the 2d of October 1804 to erect their Mill. They also proved that they did so within the time prescribed by law, and cut the race, &c. agreeably to the provisions of the Deed: they gave in evidence a plat shewing the situation of that Mill, and of the Falls Mill, called in the Indenture Thornton and Dunbar's Mill, both being on the south side of Rappahannock river; a Mill belonging to Stephen Winchester, Howard & Co. in an island, above that of Thornton and Dunbar; the Forge Mill, and four other Mills, on the north side of the river; and proved the position of the several dams; the dam of the Forge Mill being on the main stream, above all the rest; that Dunbar, at the time of the covenant, and still, owned the Forge Mill, and three of the other Mills on the north side; that Thornton and wife, by Deed, dated June

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27th 1805, conveyed the Falls Mill, land, &c. to the defendant, who, ever since, had possessed and occupied it; that, by an order of the County Court of Spottsylvania, leave was given to *Stephen Winchester* to erect his Mill; which order was made, in July 1803, by consent of the defendant and *Francis Thornton*; (1) and that the abutment for the dam to turn the water to the said last mentioned Mill was at that time the property of *Thornton* and *Dunbar*. The plaintiffs also read the deposition of a witness proving that there would have been water enough for the Falls Mill, and for the plaintiffs also, a considerable part of the time stated in the declaration, had it not been diverted to the defendant's Mill, called the Forge Mill, on the north side of the river, and to the Mill of *Winchester*; that the water, used at any of those Mills, could not be used by the plaintiffs; and that their Mill was stopped by that diversion. The defendant proved that the Mill and dam of *Winchester* were built prior to December 1802, but without any legal authority; and introduced several witnesses, who swore that, "during the period stated in the declaration, there

(1) Note. The application of *Stephen Winchester* for leave to erect the Mill in question was made to the Court of Spottsylvania County on the 3d of December 1799, though the order in his favour was not obtained until July 1803. The application of the *Hollingsworths*, was in May 1803. The consent of *Dunbar* and *Thornton* to the order in favour of *Winchester* was upon the following conditions, to wit, "that they should first have the quantity of water necessary for their Mills, commonly called the Fall Mills, as heretofore used; that is, two tub Mills upon their present construction, to be used in any way they might think proper; and that the residue of the water passing down the south fork of the *Rappahannock* should be equally divided, so as that the plaintiff (*Winchester*) should have one half thereof only for his Mill, and the defendants (*Dunbar* and *Thornton*) the residue; and that the said plaintiff should construct his dam, thereby authorized to be built, so as to suffer the said quantity of water to flow to the Mills of the said defendants. And the said defendants are to be permitted by the said plaintiff to abut their present dam against his island, formerly called *Mortimer's*. On consideration whereof, the said defendants agree to give to the said plaintiff the abutment of his dam at the place in the said inquisition mentioned, without paying any sum therefor; he relinquishing all right to the acre in the said inquisition mentioned, except enough to join his dam to. But this compromise is not to be construed, as conceding or giving up, on the part of *Robert Dunbar*, any participation of the water in the main body of the river, above the plaintiff's island, to which the said *Robert Dunbar* is entitled; and, on the other hand, this compromise is not to be construed, as an admission on the part of the plaintiff that *Robert Dunbar* is entitled to any water above the said island."

NOVEMBER, "was not a sufficiency of water in the river to work and carry
1816. "the Falls Mill." Whereupon the Counsel for the plaintiff

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moved the Court to instruct the Jury, that if, upon the said evidence, they should be of opinion that, at any time between the 27th of September and 27th of November 1806, the plaintiffs were deprived of a sufficient quantity of water for the use of their said mills, according to the terms and effect of the said Indenture or Covenant, by reason of any diversion and use, during the said time, of the water of the said river, by the said *Winchester*, by means of his dam and Mill described in the said plat, "then the said defendant had broken his Covenant, as stated in the declaration;" which instruction the Court refused to give; but instructed them, that, if they should be of opinion that, "during that period, the defendant committed any act, by which the plaintiffs were deprived of the use of water according to the terms and condition of the Covenant, and by that act was used (2) at *Winchester's* Mill, the Covenant was broken."

The plaintiffs then moved the Court to instruct the Jury that, if they were of opinion, from the evidence, that the plaintiffs were deprived of the use of water for their said Mill, according to the terms, &c. of the Covenant, during the period stated in the declaration, by reason of the diversion and use of the water of the said river by the defendant at the Forge Mills, in that case the defendant had broken his Covenant, as alleged in the declaration;—which instruction the Court refused to give.

The plaintiffs excepted, &c.; the Jury returned a verdict for the defendant; and the plaintiffs appealed to this Court.

Williams for the Appellants. The Court erred in refusing to give the instructions requested by the plaintiff's Counsel. The construction of the Covenant being a matter of law, not of fact, the Court was bound to instruct the Jury upon the law.

This was an *express* Covenant, to warrant to the *Hollingsworths* water sufficient for their Mill; and therefore the defendant was bound to performance *at all events*, or to pay damages

(2) The transcript of the Record seems defective in this place: probably some words are omitted.

for non performance. (a) It may be said that, if *Winchester* used the water improperly, our remedy was against him and not against *Dunbar*;—but *Winchester's* doing so with *Dunbar's* permission must be considered as his act, and he is responsible.

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2. The instruction given was erroneous. The Judge declared, that to make the defendant liable, the act, by which the plaintiffs were deprived of the water, must have been done during the period charged in the declaration. This cannot be law. If the act was done before the 27th of September, but the injury was produced afterwards, the Covenantor *Dunbar* was equally responsible. The declaration does not charge that that was the day, on which he did the act; but that the loss occasioned by it commenced on that day. It is similar to the case of an Eviction, in which the injury sustained is at the time of the Eviction, though occasioned by a prior act of the party, who covenanted that the title should be good.

(a) *Beale v. Thompson*, 3 Bos. and Pull. 420; *Monk v. Cooper*, Str. 763; 2 *Ld. Raym.* 1477. S. C.; *Paradine v. Jane*, *Alley's Rep.* 27; *Bel- four v. Weston*, 1 T. R. 310.

George K. Taylor for the Appellee. The question propounded by the plaintiffs, and submitted to the Court, is, was the establishment of *Winchester's* Mill, by a Court of Justice, under a compromise with the defendant, a breach of the defendant's Covenant with the plaintiffs?

It was not: because the contract ought to receive a reasonable, and, if necessary, a restrained interpretation, for the accomplishment of justice, according to the intention of the parties, as collected from the whole context of the instrument. (b) Now what is the intention of the parties, to be collected from the whole context of this instrument?—1st, that the plaintiffs should have an acre and a half of land: and they have it. 2d. That they should have a sufficiency of water from *Thornton and Dunbar's pond*, provided they could spare it, after supplying their own wants. When a man grants the water out of his pond, he grants what, having come down to him under an order of the law, is his own. But the water in *Thornton and Dunbar's pond* is very different from the water of all *Rappahannock River*: the one is their own; the other belongs to the public. The public granted to them the right to so much only of the water, as would at all times be necessary for their Grist Mill. When, therefore, they sold a part of that water,

(b) *Browning v. Wright*, 2 Bos. and Pull. 22.

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Again : the plaintiffs purchased with full knowledge of *Winchester's* application, and of the probability of its success. If they had wanted *Thornton* and *Dunbar* to stipulate for more than the water in their pond, would they not have insisted on terms broad enough to cover all the water in the river ? But they knew, from the previous experience of several years, during which *Winchester's* Mill had been in operation, that, generally, what came afterwards to the Mill of *Thornton* and *Dunbar* was sufficient for both ; and, therefore, they bargained for no more. But even if this could be tortured into a Covenant for all the waters of Rappahannock, yet as, for sixteen years past, with the exception of two months, the compromise has been harmless, are we to be liable for the *act of God*, during the uncommonly dry season of 1806. (a)

(a) *Nelson v. Anderson*, 2 *Call*, 286.

As to the compromise itself, what would opposition have availed ? In that wheat country, the public good required the Court to encourage the establishment of manufacturing Mills. Our previous rights were only to as much water, as might be necessary for our purposes. Had we opposed the motion of *Winchester*, the Court would have reminded us of this. Had we reminded them of our bargain with *Hollingsworths*, they would have told us they remembered that too, and would take care of all. But by the compromise itself, provision was made for the plaintiffs ; for *Winchester* was bound so to construct his Mill, as to use only one half of the surplus water after supplying ourselves ; the other half to be left for the use of the plaintiffs. Now, from the plaintiff's own testimony, it appears that *Winchester's* Mill continued to grind after the plaintiffs had ceased ; which proves, not that our compromise was injurious, but that *Winchester* had acted fraudulently, and therefore, under the act of Assembly concerning Mills, is liable to

(b) *Rev. Code*, an action. (b)
1st vol. ch. 105.
sect. 7.

Wickham on the same side. The plaintiffs prayed the Court to give instructions on points, which were proper to be decided by the *Jury* and not by the Court, who therefore very properly refused to give them.

With respect to the construction of the Covenant, it is a plain one ; and, taking into consideration the situation of the

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parties, no one can be at a loss to discover their meaning. No change of the existing Mills was contemplated: the water was to be taken, as it then flowed. Not a word is said in the Covenant about putting down the dam of the Forge Mills, or that of *Winchester's* Mill. It is true that *Winchester's* Mill had been erected without leave; but a subsequent order granting leave relates back to the time of erection. The right to recover damages being left open to every body, the erecting a Mill without leave is no bar to the Court's granting it afterwards. Before the date of this contract, *Winchester* had applied for leave: there was therefore his probable right, with present possession. The *Hollingsworths* entered into this Covenant, knowing these circumstances.

The consent of *Thornton* and *Dunbar* was only, that *Winchester* should have the surplus water. The *Hollingsworths* were not bound by that consent. They might have opposed *Winchester's* motion for the Mill, and if defeated, might have appealed. It cannot be presumed that they were ignorant of those proceedings: they were bound to take notice of what was done in a Court of Record. All, they could possibly contend for, was an equal right with *Winchester*, who in fact had a priority of right, because the inquest on his writ of *ad quod damnum* had been taken first.

There is nothing in the law, forbidding a Court's giving leave to erect a new Mill on a stream above an old Mill already standing, and to deliver the water below such old Mill. It is a question of sound discretion: it ought to be done with great caution on a small stream, but may with great propriety on a large river, whose water is abundant.

Winchester is a wrong-doer, so far as he took more water, than he was authorized to take by the order, which established the most exact equality between the *Hollingsworths* and him. And 2 *Saund.* 178 (notes 7 and 8) is decisive, that a Covenantor is not bound to guard against the unlawful acts of third persons.

The object in bringing this suit is to give a preference to the latest over the more ancient Mills.

The order, granting leave to the *Hollingsworths*, was subject to the prior order in favour of *Winchester*. By building their Mill they made their election to acquiesce, and waved all right to sue *Thornton* and *Dunbar*. To authorize them to

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Wirt in reply. It is not true that the instructions, moved for by the plaintiffs, called upon the Court to settle the facts as well as law. The evidence was set out in the bill of exceptions, to shew that the instructions were relevant and not abstract; but the Court was only requested to give an opinion upon the *legal* construction of the contract.

This is a case of covenant between parties possessing different degrees of knowledge in relation to the subject. *Dunbar*, for several years before his contract with us, had been the proprietor of the Forge Mills, to which the water was drawn from the main stream above the island, and of the other Mills on the north side of Rappahannock down to *Falmouth*, as well as of the Falls Mills on the south side. He was therefore experimentally informed of the average annual supplies of water, and what he might safely undertake to purchasers of his scites on the south side. His land on the south side was chiefly valuable for its Mill seats: but no purchaser of a lower scite would be satisfied, without a certainty that his supplies of water would not be cut off by those, who might come after him, and build above. It was perfectly natural, therefore, for a purchaser below, to exact a covenant and warranty of a supply of water, and as natural for the owner of the soil to make it, if his past experience justified such a covenant, as prudent on his part. Under these circumstances, the *Hollingsworths* were induced to make the purchase of *an acre and a half of ground at five thousand dollars*, and to incur a heavy expense by digging, over difficult ground, a canal capacious enough to carry water for five wheels.

It is a case of *express* Covenant, before a Court of *law*; in which there is no power on the part of the Court to relax the terms of the Covenant; and in which, in this instance, it would be unjust, as well as illegal, to exercise any such power; *unjust*, because it would place the *Hollingsworths* on ground, which they would never have occupied, but for the inducement of this covenant, on the faith of which they have encountered vast expense; and *illegal*, because such a course would be to impair the obligation of contracts, to dissolve existing contracts,

and to make new ones against the sense of the parties. In England, it is only necessary to shew a Covenant to be *express*, to induce the Court at once to give up all ideas of *construction*; much less of mollifying the Covenant under a notion of hardship on the part of the Covenantor. The answer is, "you ought to have considered this before you made the Covenant; and if it be hard on you to insist on your executing your Covenant, it may work equal hardship on the Covenantee to discharge you from it."

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I shall shew, by and by, that a compliance with this Covenant on the part of *Dunbar* was perfectly easy; and that whatever hardship exists in the case arose, first, from his voluntary arrangement with *Winchester*, after his warranty to us; and secondly, from his avarice in the use of his Mills on the north side. At present, I propose to recall to the Court the principles on which express Covenants are enforced in England, and will show, as I go along, their application to the objections raised on the other side: thus,

1. It is objected, that we make *Dunbar* warrant against the acts of strangers, over whom he could have no control. Answer. The case of *Paradine v. Jane*, *Alley's Rep.* 37. was a case of an express Covenant to pay rent; the tenant pleaded that he had been driven from the premises by a hostile invasion, (that of Prince *Rupert*.) and was held out, by force during the whole term, for which rent was claimed; whereby he could not take the profits; yet the plea was ineffectual.

2. It is objected, that we make him warrant against *droughts*, which are the acts of God. The principle was settled in the same case, on the authority of *Dyer* 33, a. that an express Covenant to repair is obligatory, though the house be burnt by lightning, or thrown down by enemies. (a) The case of *Monk v. Cooper*, 2 Str. 763, and 2 Ld. Rayn. 1477, is the case of a tenant, forced to pay rent by virtue of an express Covenant, although the premises were burnt without his default; and although the lessee was expressly exempted from repairs in that event. On the same principle, and on the authority of that case, was decided that of *Belfour v. Weston*, 1 Term Rep. 310. The distinction, between a duty created by law, and an express Covenant, is very clearly laid down in *Beale v. Thompson*,

(a) See also
Ross v. Overton.
3 Call 300.

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3 *Bos.* and *Pull.* 420, where the case of *Paradine v. Jane* is again recognized as law.

It would seem necessary, then, only to inquire, whether the Covenant on the part of *Dunbar*, to supply us with water for two wheels, was, or was not, an *express* Covenant, and the warranty of that water an *express* warranty?

The Covenant is recited in the body of the deed : it sells, 1st, an acre and a half of land for a Mill seat ; 2dly, water, to be taken from *Thornton* and *Dunbar's* pond, amply sufficient for two overshot wheels. If the sale of this water be not express, neither is that of the land. It is objected, that nothing more is sold, than the privilege of taking water from the pond : but it is a sale of "the water ;" the pond is merely the place of delivery. If any doubt can be entertained upon this subject, it is removed by the deed itself, in which the privilege and the water are *distinctly* and *separately* recited, both in the conveying part and in the warranty. As to the objection, that the water is to be taken from their pond, it is like a sale of any other article, deliverable at a particular place ; as flour from a Mill, &c. There is no proviso in the deed, that the *Hollingsworths* should have the water, *if it should be there* ;—the sale and warranty was expressly and absolutely of water sufficient for a specified purpose ; and, if it was not there, *Thornton* and *Dunbar* were jointly and severally bound to procure it, or to make compensation in damages. It is no argument to say that this is making them sell and warrant what they had no right to,—the water of the river. They had already a sufficient command of water to enable them to comply with the warranty ; or if they had not, and could not procure it, still, according to the cases, they were bound to answer us in damages.

The reservation, in behalf of their own Mill, qualified the generality of the words, so far as that reservation goes, but no farther : towards all other objects and purposes, the terms of the Covenant, Grant and Warranty are universal and express. Now, let it be remembered that *exceptio unius est exclusio alterius* ; and, *expressum facit cessare acitum*. The express reservation of water for the Falls Mill excludes every tacit or implied reservation for any other purpose : none for the Forge Mills ; none for *Winchester's* Mill ; against these and all other inter-

ferences, except the one expressed, the Covenant and Warranty are express and universal. If, then, we were deprived of water by any other Mills, or any other cause, than that, which we agreed should deprive us of it, the Covenant and Warranty are broken. It may be said, there was no necessity to make a reservation of water for the *Forge Mills*; for they were ancient, and their antiquity gave them a legal right in preference to us. But so were the *Falls Mills*, and their antiquity might equally have protected them. We are not claiming a preference over the *Forge Mills* by operation of *law*, but by the express *Covenant*; and we point to the *Forge Mills*, as furnishing the Covenantor with the means of complying with his Covenant, and as one of the causes of the deprivation of water enough for our wheels, not provided for by the Covenant.

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It is said, that the Court is to look at the state of things at the time of the Covenant; that the parties did not propose to change that state; and we were to take the water, as it *then* flowed into the pond. Agreed, as to the first part of these propositions: but, then, look at both sides: look at the inducement, which led *Hollingsworth* to give this high price for this Mill seat: and, as to their taking the water, "*as it then flowed into the pond,*" there is no such provision in the Contract.

If this construction of the Covenant be correct, and the principal true, that he, who enters into an express Covenant, is bound to compliance at all events, much more ground is covered, than the instructions we called for made necessary. For if it be true, that *Dunbar* was bound to make his warranty good against every cause, save only the use of water for the *Falls Mills*, then, any other cause, which deprived us of the use of the water, is a breach of this Covenant.

The breach, too, is aggravated by having been the effect of a consent on the part of *Dunbar*; disabling him from a compliance with his Covenant, unless by drawing on the waters of the *Forge Mills*. From 1799 'till 1803, as long as he chose to resist *Winchester*, he kept him at bay; and it was not until his consent was given, that *Winchester* obtained his order. It was then not the act of the Court, but the effect of an agreement. He did this to gain an advantage to himself; an abutment against the island; regardless of his Covenant with us. And

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what was this, but bartering away the water, to which we were legally entitled?

It is objected, that *Winchester's* Mill was erected before the date of our Covenant. True; but unlawfully erected, therefore liable to be abated. "We knew the probability of his success, and therefore should have calculated on it." *Dunbar* knew it equally well, and, therefore, should have taken care how he entered into a Covenant and Warranty which *Winchester* might disable him from complying with. The very arrangement he made with *Winchester* is a practical exposition, of the Covenant, by *Dunbar*; shewing that he considered himself *bound* to see that we were supplied with water.

"We might have resisted *Winchester's* application for the "Mill." We were not interested in resisting it: we felt secure under our Covenant and Warranty, from *Dunbar*; and he, who was interested, was a party in that contest.

Again, it is said, "the consent given by *Dunbar* did not "bind the Court." But the order of the Court was expressly founded on it. "The Court would have done the same thing, "or worse, whether he consented, or no." This is an assumption: the Court did not do the same thing for four years; and never did it 'till he gave his assent. "*We* ought to have calculated on other Mills being built above us." *He* ought to have calculated on it before he entered into his warranty. "*Dunbar* is not bound for the acts of *others*, under authority "of 2 *Saund.* 178, notes 7 and 8." Those notes relate to a different species of Covenants; for *quiet enjoyment simply*; and merely decide that, on such a Covenant, the Covenantor is not bound for acts of strangers. But suppose it had been "for "quiet enjoyment against himself and *all others*:"—the case would then have been different. (a) This, however, is not a *passive* Covenant, like that for quiet enjoyment: it is an *active*, express, and positive Covenant, like that to pay *rent*; as to which, we have seen that the party can not excuse himself, either on account of the acts of strangers, or of God. Besides, the cases in *Saunders* turn on the ground that the party has a remedy against the wrong doer: whereas *we* have no remedy against *Winchester*, who is acting under an order of Court founded on the consent of our grantor. If he has violated his

(a) *Chaplin v. Southgate*, 10 *Mod.* 383.

contract in taking more than his half of the water ; we are no parties to *that* contract ; the right to sue *him* is in *Dunbar*.

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Thursday, November 7th, 1816. The President pronounced the Court's opinion, that the instructions, asked of the Superior Court by the Appellants, involved their right to the *exclusive* use of the water, used at the two Mills, in the Bill of Exceptions stated, during the term therein also mentioned ; and, as the question touching the said right depended on the *testimony*, stated in the Bill of Exceptions, *as well as the Indenture*, on which the action was grounded, it was not competent to the said Court to say whether the same was *sufficient*, or not, to warrant the conclusion, set up by the said Appellants in relation thereto ; unless the *sufficiency* thereof had been duly submitted to the judgment of the said Court by a *demurrer to evidence* ; and that there is no error in the said judgment in declining to give the instruction asked as aforesaid : but the Court is of opinion, that, while the Superior Court had justly disclaimed passing an opinion upon the contract, for the reason afore mentioned, the instruction, actually given by it in relation to *Winchester's* Mill, seems to be a departure from that principle, and is liable to the objection, that it might have tended to limit the inquiries of the Jury to dams erected, or obstructions made, during the term stated in the said Bill of Exceptions, in exclusion of such, as might have been made anterior thereto ; and that the said Judgment is erroneous ; it is therefore reversed, the verdict set aside, and the cause remanded for a new trial, on which no such instruction is to be given.

Judge COALTER, differing, in some points, from the rest of the Court, delivered the following opinion.

The Bill of Exceptions in this case states that, on the trial, the plaintiffs offered in evidence a Deed, executed by *Thornton* and *Dunbar* the defendant, to the plaintiffs, dated the 3d of March, 1803, in which is recited an agreement entered into between them on the 16th of December, 1802, by which *Thornton* and *Dunbar* covenant to sell and convey to the plaintiffs an acre and a half of land, for a Mill seat, together with the necessary right of taking water by a canal, to be cut from the lower end of the forebay of *Thornton* and *Dunbar's* Mill, called

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the Falls Mills, *ample* sufficient for two overshot wheels, &c., and which canal was to be of sufficient width to contain water for five overshot wheels; provided that an *ample* quantity of water was to be left for the said Mills of *Thornton* and *Dunbar*. The deed then goes on to convey, with warranty, the land and water privileges according to the stipulations in that agreement. They also produced the Record of Spottsylvania County Court of their application for leave to erect their Mill. Their application was made on the 3d of May, 1803, to erect a Mill on their land, the water to be taken out of *Thornton* and *Dunbar's* dam on the Rappahannock River, *the bed whereof belongs to the Commonwealth*. The order of Court in their favour was made in October, 1804. The Jury in their Inquest, and the Court in their Judgment, have reference to the Deed and Covenant between the parties, and state also, that the bed of the river, from *Thornton* and *Dunbar's* dam on which the water is to be taken, *belongs to the Commonwealth*, and the Mill is established agreeably to the terms and conditions of the Deed and Covenant.

It then states that the plaintiffs *proved* that, before the expiration of the three years mentioned in the Covenant, they built their Mill, and dug the canal, according to the agreement; and that, thereafter, until the 27th of September, 1806, they enjoyed a sufficient quantity of water. They also introduced a plat of the river, which the parties admit, and agree gives a true representation thereof, *and proved*, that the water used at the Forge Mills, *Winchester's* Mills, and the Falls Mills, all of which are represented on said plat, could not be used at their Mill, and that the Forge Mills had been erected long before the sale to them, and at that time and ever since, belonged to the defendant.

It appears from the plat, that there is an island in the river, called *Mortimer's* island, now the property of *Winchester*; that the Forge Mill dam is erected across the river, above this island, from which a canal is taken, and which supplies water to what are called the Forge Mills, and several other Mills below, and returns the water into the channel on the north side of the island. That the water to work *Winchester's* Mill, which is on the island, is taken out of the south channel, by a low dam above the dam of *Thornton* and *Dunbar*, mentioned in the

contract, which is also across the south channel, and discharges the water also into the north channel, so that it never returns to the dam of *Thornton* and *Dunbar*, from which the plaintiffs get water to their Mill.

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The plaintiffs also introduced a deed from *Thornton* to *Dunbar*, I presume, to show that the title is now in the latter.

They then gave in evidence the record of the proceedings in *Winchester's* application for leave to build his Mill. This application was made in December, 1799, and states that he is owner of land on one side of the river, *the bed of which belongs to the Commonwealth*; that *Thornton* and *Dunbar* own the lands on the other side; and he prays for an abutment against their land, &c. The Inquest is taken on the day of March, 1800, authorizing a dam of a certain height, &c. The Order for leave to build the Mill was entered in July, 1803, in conformity with a compromise between him and *Thornton* and *Dunbar*, to this effect: that *Thornton* and *Dunbar* shall first have the quantity of water necessary for the Falls Mills; and that the residue of the water, passing down the south fork, shall be equally divided, so that *Winchester* shall have *one half thereof only*, and *Thornton* and *Dunbar* the residue; they to have an abutment against *Winchester's* island for their present dam, and *Winchester* to have an abutment against their land, on giving up the acre condemned by the Jury, and without paying the damages found: other matters in dispute between those parties about the water above the island not to be considered as yielded by either. All these documents are referred to, and made a part of the Bill of Exceptions, and of the Record.

The plaintiffs also gave in evidence the deposition of *John Ward*, which is admitted by the parties, and goes to prove the defect of water at the plaintiffs Mill during the time laid in the declaration, and that, *if either the Forge Mill or Winchester's Mill had stopped, there would have been water enough for a considerable portion of that time.*

The Bill of Exceptions then states, that the *defendant* proved that *Winchester's* dam and Mill had been erected and used three or four years before the contract entered into, as aforesaid, between the plaintiffs and defendant, and that the plaintiffs knew it; and also introduced a witness, who swore that, *during the*

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time laid in the declaration, there was not water enough in the river to work the Falls Mills.

Whereupon the plaintiffs moved the Court to instruct the Jury that, if, upon the said evidence, they should be of opinion that, at any time within the period, laid in the declaration, the plaintiffs were deprived of a sufficient quantity of water for the use of their Mills, according to the terms and effect of the agreement, by reason of any diversion and use of the water by *Winchester*, then the defendant had broken his Covenant. The Court refused to give this instruction, but instructed the Jury that, if they shall be of opinion that at any time within that period the defendant committed any act, by which the plaintiffs were deprived of the use of water according to the terms and conditions of the contract, and *by that act* it was used at *Winchester's Mill*, the said Covenant was broken.

The plaintiffs then moved the Court to instruct the Jury that, if they were deprived of water by the use of it by the defendant at the Forge Mills, it was a breach of the Covenant ; which instruction the Court refused.

The Jury having found a verdict for the defendant, the plaintiffs appealed.

This case was argued before us as to what should be considered the sound construction of the contract ; no doubt seeming to be entertained, by the counsel on either side, of the power of the Court to take into view as well the facts relative to the situation of the subject matter of the contract, as of the parties at the time it was entered into.

I believe there would be no great difference of opinion between the Judges as to the construction of the contract, provided it had been proper and competent for the party to call for such opinion by way of instruction to the Jury, instead of having that question presented for the consideration of the Court by a demurrer to evidence, special verdict, or case agreed. The propriety of the course taken is, therefore, first to be considered, and in which I have the misfortune to differ from the rest of my brethren.

So far as this case depends on the written documents and records, it would seem to me within the province of the Court to examine and decide on their legal effect ; and that so far as the Bill of Exceptions, instead of setting out the parol evi-

dence at large, states generally *the weight of it*, and that it proved so and so, I consider it as tantamount to, and in effect, a case agreed, as to such facts so stated *to be proved*. (a.)

All the facts in this case, which are in the smallest degree explanatory of the situation of the subject matter of the contract, and of the knowledge of the plaintiffs of that situation, at the time it was entered into, are to be found in the written documents, or in the facts *so stated to be proved*. The deposition, stated in the Bill of Exceptions, goes altogether to the actual want of water, and the probable loss occasioned thereby, and to the fact that *if the Forge or Winchester's Mill had stopped, there would have been water enough*; on which latter point there is a contrariety of testimony, the defendant's witness swearing that *there was not water enough in the river for the Falls Mill*; so that, had the instruction been given as asked, this point was still open to the Jury, who, (if they believed the defendant's witness,) might, nevertheless, have found for him; and therefore the instruction was asked hypothetically as to this point, and which is also reserved for the Jury alone, as well by the nature of the testimony, it having no relevancy to the point submitted, as by the manner in which it is mentioned in the Bill of Exceptions.

But if there had been a contrariety as to the other facts, as, for instance, whether *Winchester's* Mill and dam were in existence at the time of the contract, or whether that was known to the plaintiffs, still I think it would be competent to the parties, and that it is the constant practice, to apply to the Court to instruct the Jury that, if they shall be of opinion, from the evidence, that the fact is so and so, then they ought to find in a certain way. It would seem to me, that great inconvenience and injustice would result from the negative of these propositions. The parties cannot be compelled to agree a case, nor can a Jury be forced to find a special verdict; and in the very case before us, wherein there was a contrariety of evidence as to one point, which a Jury alone can weigh, a demurrer to evidence would have been improper. In all such cases, the party would be deprived of the legal knowledge of the Court, and of his privilege to bring his case finally before this tribunal.

I cannot perceive how the case of the construction of a covenant, that is to say, what was the true meaning and inten-

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tion of the parties thereby, can differ from other cases ; unless, indeed, it is said, that the facts, disclosing the situation of the subject matter of the contract, and of the parties, at the time it is entered into, cannot be considered by a Court, when deciding on the construction to be given ; but that, in such case, the Jury alone can determine on the construction ; in other words, that what was the meaning and intention of the parties, in all such cases, is a matter of fact to be found by the Jury. According to this reasoning though, if the Jury in this case had found a special verdict, setting out all the written documents in the Bill of Exceptions, and all the other important facts in the case, this verdict ought to have been set aside, because the Jury did not find, *as a fact*, that the defendant did or did not intend by his contract, to warrant against *Winchester's* use of, or right to use, the water : and hence it would follow, that this is a case, in which no special verdict could be found ; for the meaning and intention of the contract in this respect being the very point in controversy, and the only one, that could be reserved for the opinion of the Court, the finding of the Jury, as to this point, one way or the other, would amount, in effect, to a general verdict, leaving nothing for the Court to decide. So I might say of a case agreed ; unless, indeed, the parties were to agree that the true construction of the Covenant was so and so ; (for, if that is a matter of fact, it must be either agreed or found ;) and which, in this respect, would amount to a confession of judgment by the one party or the other. And, as to a demurrer to evidence, there could be none in this case, there being, as before stated, a contrariety of testimony as to one important point.

For these reasons, and believing, from as careful an examination of the cases, as I have been capable of giving them, that there is no case in this Court, or elsewhere, in opposition to the doctrines for which I contend, I am of opinion that the question whether, according to the true construction of this contract, the defendant intended to warrant against any use of the water by *Winchester*, which use might prove injurious to the plaintiffs, was properly propounded to the Court below for its opinion, and is now properly before us for decision as well on the Covenant itself, as on the other facts above stated.

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I am also of opinion, that the Court below properly refused to give the instruction asked, being at present of opinion that the contract cannot be construed to bind the defendant to warrant, either that *Winchester* should make no use of the water, when such use would be injurious to the plaintiffs, or that he should not use more, than he was authorized by the compromise and order of Court; the latter being a wrong, for which an action would lie against him; and the farthest I would go in this case would be to say, that, if *Winchester* acquired by the compromise a right to use more water, than he had been in the habit of using at the time of the contract, so far as the plaintiffs sustained injury by such *acquisition* and *greater use*, the defendant should be responsible. Of this latter point, however, I have some doubt; and (among others) for the following reasons. When the plaintiffs purchased, they saw *Winchester's* Mill and Dam in operation, and its effect upon the pond from which they were to draw their water; and no express Warranty is given against these effects; on the contrary, a large surplus of water, beyond what will suffice for the plaintiffs, seems to have been expected, even to the extent of three more overshot wheels: but, as to this point, mainly, for this reason; that, when the contract was made, the plaintiffs saw *Winchester's* Mill in operation, and had a right to presume, and either did presume it was erected by leave of the Court, whose order it was their duty to inspect, if they had doubts of its effect upon the property they were about to purchase; or they knew the fact of the *lis pendens* as to this matter, the inquisition in which had been found before they purchased. Knowing *Winchester's* claim, as spread upon the record, to wit, that he was owner of lands on one side of a large river, *the bed of which belonged to the Commonwealth*; and that the Commonwealth had theretofore only granted a portion of its water, they were bound to notice the extent of *Winchester's* rights or equitable claim on the Commonwealth. This, it would appear to me, was equal to one half of the whole water, provided his Mills would require that much, and provided that would not injure the Falls Mills theretofore established; and I would ask, if that case had been litigated throughout, and the Court had finally decided to that extent in favour of *Winchester*, and it had appeared that such decision could do no injury to the Falls Mill,

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whether such judgment ought to have been reversed? Upon what principle could *Thornton* and *Dunbar*, owners of land on one side, have contended for greater rights, than the owner on the other, unless more than the half had been previously granted, as necessary to the Falls Mills? Such then was the nature and probable extent of *Winchester's* claim, known to the parties, and who nevertheless require no special Warranty against it; and had the case been litigated, and the Order of Court extended as far, as is above supposed, and that had been finally affirmed here, could the defendant be considered, as warranting against this? The compromise, then, is, to my mind, clearly beneficial both to the plaintiffs and defendants, as well as to the quantity of water, as in the obtaining an abutment for their dam against *Winchester's* Island; which it seems it before had not; (perhaps it was only a wing dam;) and which, I presume, may have been an important acquisition. I therefore doubt whether, if the compromise gave *Winchester* more water than he had been in the habit of using; yet, as it gave him much less than he might, and probably would have acquired, if the contest had continued, the defendant ought to be answerable.

I forbear, however, to go at large into my opinion on this contract, in as much as I understand no instruction will be given, and, if the cause goes back, it may hereafter be presented to us in a different shape. Thus far I have thought it, perhaps, not improper to go for the satisfaction of the parties.

For these reasons, too, I think the instruction given was wrong; because it authorizes, in one event, a recovery for the diversion of the water by *Winchester*; provided the defendant did any act occasioning such use within the time, laid in the declaration. By this I understand that, if the compromise had been entered into within that time, the plaintiffs might have recovered. But, surely, if the defendant after the contract, had diverted the water to another Mill, either of his own, or of a third person, and the injurious effects of which had not been felt until within the time laid, it would have been a breach under the present declaration; for the continuance of the dam during that time, though not then built, would be, as to the water diverted thereby, a new act of diversion within the time. But this, I apprehend, was not the understanding of the is-

struction given: it was, however, calculated to mislead the Jury, and, on that account also, wrong.

I think, also, that the Court was correct in refusing the last instruction asked for.

Johnson against Hendley.

Decided, Nov.
9th, 1816.

UPON an appeal from a Decree of the Superior Court of Chancery for the Richmond District, by which a Bill, exhibited by the Appellant against the Appellee, was dismissed on the ground, that in the Chancellor's opinion, "*a Court of Law could clearly and without doubt adjust the matter in dispute.*"

The object of the Bill was to get relief against a fraud alleged by the complainant to have been perpetrated by the defendant, (who was his son-in-law) in writing an order, (which the complainant, not suspecting such fraud, signed without reading it) for the delivery to him of two negro men, whom the complainant had agreed to let him have on hire; the defendant, having (as the complainant averred) fraudulently inserted in the said order words, expressing that the negroes were given to him. It was stated in the Bill that the defendant claimed the negroes as his property, although he had paid off their hire, except a small balance, and had returned them at the end of the year to the complainant, whom he threatened to sue, for their services and detention, at the end of the year in which the Bill was filed. The complainant, being a very old man, was apprehensive that the defendant was only waiting for his death, thinking that he might, with greater probability of success, bring an action against his representatives to recover the said negroes. He therefore brought this suit, to have the matter fully investigated in a Court of Equity; that the defendant might say, whether the negroes in question were not hired to him, and not given? and that such relief might be granted as the nature of the case required.

The defendant by his answer denied the fraud; insisting that the negroes were really given him by the complainant. A general Replication was filed; and many depositions were taken on both sides.

1. A Bill for relief against a writing purporting an acknowledgment of a gift of property by the complainant to the defendant, on the ground of its having been obtained by fraud, presents a proper case for equitable jurisdiction, though a suit at law, founded upon such writing, might be defeated without coming into equity.

2. The second point in *Bullock v. Irvine's Administrators*, 4 *Munf.* 450, and in *Marshall v. Thompson* 2 *Munf.* 412, is again decided.

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Hendley.

In this Court, the following opinion and decree were pronounced, November 9th, 1816:

"The Court, not concurring in opinion with the Court of Chancery that this case is proper for the jurisdiction of a Court of Law in exclusion of that of a Court of Equity, reverses the Decree, which on that ground dismisses the Bill; but, there being a great mass of testimony, exhibited in the case, the *weight* of which the Court is incompetent to decide on, without the intervention of a Jury, this Court, proceeding to give that Decree, which ought to have been rendered by the Court of Chancery, directs an *issue* to try whether the fraud, alleged, in the Bill to have been practised, and which is made the ground thereof, was perpetrated by the Appellee, or not."

Decided, Nov.
19th, 1816.

M'Clean against Tomlinson.

1. A Patent is not void on the ground that the survey was made first, and the warrant obtained afterwards, though such irregularity appears on its face. THE Appellee Tomlinson brought Ejectment against the Appellant, claiming four hundred acres of land in Ohio county, on the Round Bottom. A special verdict was found, stating the title of the parties at large. That of the defendant rested on a grant to the late General George Washington, dated October 30th, 1784, for five hundred and eighty-seven acres. This grant was set forth at large in the verdict; and, on its face, is

2. An omission to insert the name of the County, in which the land lies, is not sufficient to vitiate a Patent; the place being described with reasonable certainty. stated to be issued on a survey bearing date the 14th of July, 1773, on warrants, of subsequent dates, in the years 1773 and 1774.

The verdict, after setting forth the title papers of the parties, refers to a survey shewing the interference between their claims; and states that, if the lines of Washington's Patent extend to the points, called for by the defendant, they would include upwards of *twelve hundred* acres. The original survey was found in this verdict; the date thereof being anterior to the dates of the warrants.

Judgment was given for the lessor of the plaintiff; to which M'Clean obtained a writ of *supersedeas* from this Court, where Judgment of reversal was given on the 8th of October, 1811; and the cause sent back for a new trial; "the Court being of

" *opinion that the facts, found in the special verdict, are not sufficiently explicit to enable it to give a correct judgment on the merits of the case ; particularly, in not finding, whether the Patent, issued to George Washington in the proceedings mentioned, under which the plaintiff in error claims, comprehends within the boundaries thereof those of the land in controversy.*"

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Another trial was had, and a special verdict found, agreeing in substance with the former, except that it finds, in express terms, that " *the grant to George Washington includes the whole of the land in dispute.*" It also finds that the dates of the warrants and survey are truly recited in the grant to *Washington* ; that on the 14th of July, 1773, the surveyor of West Augusta made a private survey ; and that, after the 17th of May, 1774, the date of the latest warrant, *George Washington* procured him to make out the plat and certificate of survey, on which the grant issued.

The title papers of the parties, as stated and referred to in both verdicts, stood thus : *Washington's* Patent, dated October 30th, 1784 : his deed to *M'CLean*, conveying the land with warranty, for a valuable consideration, dated August 8th, 1798. The title of *Tomlinson* rested on a grant, upon a settlement right, dated the 27th of February, 1800.

The Superior Court of Ohio county gave Judgment in favour of *Tomlinson* ; whereupon *M'CLean* appealed.

Wickham for the Appellant. The last verdict having found that the lands in dispute are included within the bounds of *Washington's* Patent, this finding is conclusive between the parties under the former Judgment in this case, by which it was determined that the inconsistency in the dates of the survey and warrants, appearing on the face of that Patent, did not affect its validity.

Doddridge contra.—I am informed that the Court gave no opinion upon the validity of the Patent.

Wickham. I contend that the Court, not having reserved the point, necessarily decided that the Patent was valid. If the Court had considered the Patent void, it would never have sent the cause back for a new trial to ascertain the bounda-

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(a) *Roberts v. Stanton*, 2 *Munf.* 129; *Ross v. O'gerton*, 3 *Call* 310. *Shepard's Touchstone*, 233.
(b) *Witherinton v. McDonald*, 1 *H. and M.* 304; *Com. Dig. Title PATENT*, (F. 1.)
(c) *Munf.* 134.
(d) 4 *H. and M.* 146.

ries. But if the question were now a new one, the Patent ought to be sustained, as good and effectual. An impossible, or contradictory date does not vitiate a Patent.^(a) Nor the circumstance, (though appearing on its face) that the survey was first, and the warrant afterwards: for, where the Patent conveys what the Commonwealth has power to grant, irregularity in obtaining it does not vitiate.^(b) In *Alexander v. Greenup*,^(c) there was no power to grant at all. The principle, also, of the case of *Lassly v. Fontaine*,^(d) applies to this case.

No testimony ought to have been received concerning the manner and time of executing the survey; and, if such testimony were proper, the facts found by the Jury do not affect the validity of the Patent; for no fact is found, which implies fraud in *Washington*, or in the surveyor; and fraud is never to be presumed. There could indeed have been no motive for such fraud; for the Commonwealth was not injured by it.

But, even if the grant were fraudulently obtained, it was not void; but only voidable by a *scire facias* ^(e) and, while it continued in force, the subsequent grant to the Appellee did not pass a title to him.^(f)

(e) *Com. Dig. Title Patent*, *F. and Acts of 1814*, ch. 23.
(f) *Norvel v. Comen & Wife*, 2 *Munf.* 257.

Doddridge for the Appellee. *Washington's* Patent in this case is the only one, with such a recital, that ever issued in this country. It is clearly not justified by the law of 1779.^(g) An unofficial survey was made; and *Washington*, afterwards, obtained Warrants and a Patent. He was bound by law to have a re-survey, after getting the Warrants.

In 6 *Bac.* 111, the cases are stated, in which the writ of *scire facias* to repeal a Patent may be awarded in England. But there is a difference between the grounds for repealing a Patent in that country, and in this. The Register of the Land Office is not seized in his demesne, like the King. He has only a delegated power, and cannot convey except in the manner directed by law.

The form of a Patent, prescribed in *Ch. Rev.* 97, is not followed in this. The County where the land lies is also omitted.

Wickham. It is certainly regular that every description, necessary to identify the land, should be inserted. The County

is not always requisite, when the spot is sufficiently notorious. Here it is known by the name of the *Round Bottom*. It might not have been known in what county the land in question was comprehended, though the place was well known. The words used in the law, in relation to the county, are merely directory to the Register; but the Patent is not void by the omission to insert them.

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Tuesday, November 19th, 1816, the President pronounced the Court's opinion, that the Judgment be reversed, "the law arising upon the special verdict being for the Appellant;" and that the Appellee take nothing, &c.

Carter's Executor's against Cutting and Wife.

Decided, Nov.
19th, 1816.

JOHN BROWNE CUTTING and Sally his wife, formerly Sally Carter, widow, and Sally, Mary, Fanny and Landon Carters,

1. When a Commissioner is stating Accounts between Executors and the

estate of their Testator, if one of them, who had for collection the evidences of debts due the estate, which might have been collected by him, be dead, his representative cannot object to his estates being charged with those debts, unless the means be furnished of charging the surviving Executor therewith.

2. In such case, the private account of each Executor, with the Testator in his life time, and with his Co-executor, and all other accounts that are necessary to make a just settlement of the matters in controversy, ought to be taken, if requested; though not specifically put in issue in the case.

3. If a father make payments in part of a gaming debt of his son, and never reclaim them in his life time, but provide by his will a fund for payment of the balance, they should not, after his death, be claimed of his son's estate, but considered as payments, or advancements, to the latter; as payments, to the amount of any previous existing accounts of the son against the father; and beyond that amount, as advancements to the son.

4. An Executor ought not to be allowed a credit for paying a debt of his Testator, appearing, on the face of the written instrument intended to secure it, to have been for money won at unlawful gaming.

5. A father having undertaken, by written agreement as surety for the payment of a gaming debt of his son; and afterwards, by his will (reciting that he had so become surety,) having devised to his son certain real estate, charged with the payment of that debt, such charge is not a condition precedent, binding the son or his representatives to pay it; but he and they shall hold the estate discharged thereof.

6. A Testator's directing all his just debts to be paid, out of the sales of certain lands, does not authorise the payment of a gaming debt of his, out of the proceeds of such sales.

7. Monies directed to be invested, by Executors, in government securities, should be accounted for, as if invested, after a reasonable time for that purpose: but the Executors ought not to be

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infant children of *George Carter* deceased, by said *Cutting* their next friend, brought suit in the Superior Court of Chancery for the Richmond District, in December, 1807, against *Landon Carter* surviving Executor of the said *George Carter*, and *Fanny Lee* and *George Carter* Executrix and Executor of *Thomas Ludwell Lee* deceased, who was an Executor of the first named *George Carter* deceased.

The Bill stated, that *George Carter*, holding large real and personal estates in Stafford and Loudoun counties, made his last Will and Testament, whereof he appointed *Landon Carter* and *Thomas Ludwell Lee* Executors, and by his Will directed that his said Executors, *as soon as convenient* after his death, should sell and convey in fee all his lands in the county of Loudoun; and, out of the proceeds, pay all his just debts; and place the surplus, if any, in six per cent. stock of the United States; and pay the dividends accruing therefrom to his wife, (now *Mrs. Cutting*,) towards her support and the support and education of his children; and, as either and each of his children married or attained to full age, transfer to such child one fifth of the said stock: and the Testator farther, by his Will, lent his said wife the rest of his lands, slaves, stocks, crops and household furniture, then in Stafford, for support of herself, and support and education of his children, 'till his eldest daughter should attain to full age; and, *then*, one thousand acres of the Stafford land (particularly described,) with the house and kitchen servants, ten plantation slaves, and the household and kitchen furniture, to the use of his wife for life, remainder to be equally divided among his children; and directed the rest of the Stafford land to be divided among his children, by his Executors; concluding with giving the *residuum* of his estate to his children:

charged with interest during such reasonable time; nor with interest upon dividends of stock, if such dividends have not been actually received. *.* See *Hooper & Wife, &c. v. Royster & Wife*, 1 *Munf.* 119.

8. Where an Executor is directed to invest money in stock, he ought to have the investment made in *his own name as Executor*; in order that, if necessary, the stock may be readily converted into money to pay the debts of his Testator.

9. Although, under peculiar circumstances, an allowance may be made to Executors, in addition to the commissions given to attornies, for collecting debts consided to them; such additional commissions ought not, in general, to be allowed, where the debtors reside in or near the neighbourhood of the Executors, who, consequently, might collect the monies themselves. *.* See *Fitgerald Executor of Jones v. Jones*, 1 *Munf.* 150; *Triplett's Executors v. Jameson*, 2 *Munf.* 243; *Sheppard's Executors v. Starke & Wife*, 3 *Munf.* 29; *Cavendish v. Fleming*, *ibid.* 198; *McCull v. Peachy's Administrator*, *ibid.* 238; *Hipkins v. Bernard*, 4 *Munf.* 83.

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that the Testator died March 20th, 1802, and both Executors qualified in the same year; that, instead of proceeding with convenient despatch, they causelessly delayed the sale of the Loudoun lands 'till September, 1803, and April, 1804, when the Executors, or *Lee* with the concurrence of the other Executor, sold *parts* of the Loudoun lands for one third cash, and two thirds distant credits: the remainder was still unsold: that the amount of sales was 10,382*l.* 8*s.* 9*d.*; that there were about 4070*l.* 2*s.* 7*d.* of debts; but what debts, or what the amount thereof, the plaintiffs knew only from report; that the surplus had not been vested in six per cent. United States stock; and *Cutting and Wife* had received not more than \$600: that the Executor *Lee* died early in 1807, leaving the defendant *Fanny Lee* and *George Carter* his Executrix and Executor; and, in the same year, *Landon Carter*, the surviving Executor of *George Carter* deceased, first directed, and then countermanded, payment of the interest of the said surplus to the plaintiff *Cutting*: that the Testator's eldest daughter, the plaintiff *Sally Carter*, came of age August 8th, 1807, and so became entitled to possession of the said provision, made for her by her father's Will; and the other children to their shares of the Stafford land: that the profits of the children's estate in Stafford (which the plaintiff *Cutting* received) even if aided by the intended dividends of stock, would not have been more than sufficient for their support, &c.; and that the Testator had other estate, which was still in the hands of the surviving Executor; particularly, a gold watch and chain. The Bill prayed a discovery and account of the credits and other personalty of the Testator that came to the Executors; a discovery and account of the profits they received from the Testator's lands; an account of their administration; (*Cutting* proffering an account of the profits of the children's Stafford lands by him received;) *that the surviving Executor be compelled to pay such interest on the surplus of the Loudoun sales, as such surplus would have yielded had it been vested in six per cent. United States stock according to the Will*: and for general relief.

A Bill of Revivor was filed in the name of *J. B. Cutting* Executor of *Sally Carter* (the daughter,) who died after the suit brought, and, by her Will, gave the whole estate to Mrs. *Cutting*.

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The answer of *Fanny Lee* denied any personal knowledge of the subject, and called for full proof; admitted the Will, and the several Executorships; and insisted that the surviving Executor *Landon Carter* was the accountable person to the plaintiffs. Her Co-executor *George Carter* never answered.

The answer of *Landon Carter* admitted the Will, the several Executorships, and the character in which the plaintiffs sued; and stated, that he resided at a distance from *Loudoun* county, in which his Co-executor *Lee* resided; that the Testator not having prescribed the terms on which, nor the time when, the lands *there* should be sold, he left that matter to *Lee*, who, from situation, was the best judge thereof, and who appointed the time and terms of sale, and therein acted judiciously; that some small parcels remain unsold, because incumbered, and therefore not saleable, except at a great sacrifice; but they had taken steps to settle titles; that, in the mean time, these unsold lands are yielding fair rents, which enure to the benefit of the plaintiffs; that the plaintiffs cannot justly claim the whole proceeds of the sales enhanced by the *credit*, and interest thereon from the times of sales, as if they had been made for *cash*: that the affairs of the estate devolved almost exclusively on his Co-executor *Lee*, 'till his death; the papers and vouchers pertaining thereto were among *his* papers, and were selected and retained by this defendant, who was *then* settling the accounts of the Executorship before Commissioners appointed by Loudoun County Court, and is ready to *account* before Commissioners of the Court of Chancery: that no debts were due to his Testator, within his knowledge, other than Loudoun rents, which *Lee* received. He admits that the gold watch, but denies that the chain came to his possession: the other personal property was left in *Cutting's* hands; and he calls for an account of it, and of any disposition made of it by *Cutting* and wife. He farther stated that some of the money, due for lands sold, remained uncollected; notwithstanding all due diligence; and, when collected, should be duly applied according to the trust: that the plaintiffs had received much more than was stated in the Bill; and *Cutting* and wife had very little to receive.

General Replications were filed to both answers, and commissions to take depositions were awarded. At February

Term, 1810, the Chancellor referred all the accounts between the parties to a Commissioner. Two reports were successively made, and set aside, on various exceptions. The Chancellor then re-committed the Accounts, with the following instructions to the Commissioner:—

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1st. "That the Accounts of Executors, where they act separately, should, as in this case, be separately stated."

2d. "That the balance, without interest, be struck at the end of each year, after allowing five per cent. commissions, for risk, trouble and such expenses, as accrue in the course of their own business; but, when they are taken out of that course upon their Testator's affairs, reasonable expenses should be allowed. *Vide Miller v. Beverly*, 4 H. and M. 415."

3d. "That the balance of each year, on either side, should be considered a principal debt, carrying interest from that time." (1)

4th. "That they should not be charged with debts, due to their Testator in his life time, not received by them, unless lost by their negligence; but still they are liable for debts contracted by themselves, in manner aforesaid, (and so it was held in this Court in the case of *Guerrant v. Johnson*), unless in the cases provided for in the Act of Assembly, Rev. Code, 1st Vol. ch. 92. sect. 41. p. 165."

5th. "That they should be charged with all sums received, whether before or after qualification."

6th. "That money directed to be vested in government securities should be accounted for, as if vested, after a reasonable time for that purpose; *paying common interest in the mean time*."

7th. "That Executors, being debtors, should account for their debts without any deduction; in other words, they are not entitled to a commission on debts due by themselves."

8th. "That where they have occasion for the aid of counsel, the customary allowance to such counsel, whose services they cannot control without, should be allowed."

9th. "That, in a suit exclusively for the settlement of Executor's accounts, and distribution of the Testator's estate un-

(1) Note. The Chancellor in his final decree disapproved of this third instruction, upon the principles laid down in the case of *Lightfoot v. Price*, 4 H. and M. 431.

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“ der his Will, items of debit or credit with the Testator in his
“ life time, by his Executors, should not be allowed, unless by
“ consent of parties; because such matters, in such a suit, are
“ not in issue between the parties.”

10th. “ That, in cases where a Testator, in his life time,
“ received *compensation*, in confidence, for the payment of an
“ obligation (*though void in law*,) to a third person, which is
“ afterwards discharged by his Executors, they should be al-
“ lowed a credit for the same, although they knew of the
“ circumstances under which such obligation was created.
“ And

11th. “ That notice, to a party, of the time of taking the
“ Account, should never be left in doubt.”

In obedience to these instructions, the Commissioner pre-
sented a third Report, which, at February Term, 1812, was re-
commended, by consent of parties; and the Commissioner was
ordered to state an account between *Landon Carter* and *George
Carter*, for transactions in the life time of the latter; neither
party waving objections to the relevancy of such account to
the issue in this cause, &c.

The Commissioner then made his *fourth* Report, stating,
1st, An Account between *Landon Carter*, as Executor of
Robert W. Carter, with the estate of *George Carter* deceased;
shewing a balance due to the latter of 185*l.* 3*s.* 11-2*d.* (This
account was excepted to by *Landon Carter*, as not within the
issue between the parties in this cause.)

2d. An Account between *Thomas Ludwell Lee*, Executor, and
the estate of his Testator, *George Carter*, shewing a balance of
principal, due from this Executor, of \$16,997 20 1-2 cents, (be-
ing stated as if vested in *United States* six per cent. stock,) with
\$8733 98 cents, estimated amount of Interest and Dividends.
The difference between the principal, not vested in stock, and
the same vested in stock, is stated at \$705,46 1-2 cents, and the
difference between simple interest and dividends at \$433,78
cents. To this account, Mrs. *Lee*, the Executrix of *Thomas
Ludwell Lee*, objected; alleging, “ that, soon after the death of
“ Col. *Lee*, the surviving Executor took such papers and evi-
“ dences of debt out of the possession of this defendant as en-
“ tirely deprived her of the power of doing any thing with ef-
“ fect; that the amount of those uncollected balances, at least

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* the greatest part of them, amounting to nearly the sum of "twenty seven hundred dollars, is still charged, to this defendant, although the surviving Executor or his attorney, hath collected a part thereof, and taken security from *William Wright*, and executed a deed for his purchase, which balance, "this defendant believes, is nearly all that is now due and un-
"collected."

3d. An Account between *T. L. Lee*, Executor as aforesaid, and *Mrs. Cutting*; shewing a balance due her from this executor of \$1860,53.

4th. An Account between *T. L. Lee*, Executor as aforesaid, and *Miss Sally Carter*, shewing a balance due her from this Executor, of \$1697 21 cents.

5th. An Account between *Landon Carter*, Executor, and the estate of his Testator, *George Carter*; shewing a balance due from him of principal, converted into *United States* six per cent. stock, amounting to \$12,772 92 cents; and of estimated amount of interest and dividends, \$5482 94 1-2 cents.

6th. An Account between *Landon Carter*, Executor of *George Carter*, and *Mrs. Cutting*, shewing a balance due from her to this Executor, of \$456 76 1-2 cents.

7th. An Account between this Executor and *Miss Sally Carter*; shewing a balance, due from him to her, of \$957 34 cents.

8th. An Account of the estate in *Stafford*, called the Park estate, shewing a balance, due from *Mrs. Cutting* to *Landon Carter*, Executor of *George Carter*, of \$673 43 cents. The Executor excepted to this Account because *Mrs. Cutting* was charged with only *two thirds*, instead of the actual proceeds of the sales of two female slaves, which she had no right to dispose of, except during her life. These Accounts were all brought down to April 7th, 1813.

To this Report, the plaintiffs filed many exceptions; the most important of which were against the allowance of credits to the Executors for payments made by them, respectively, in satisfaction of a *gaming* debt from *George Carter* to a certain *John Cooper*. The material circumstances in relation to this debt, according to the Exhibits and Depositions, were, that *Cooper* *unfairly won at play*, a large sum of money from *George Carter*; that a written agreement was entered into, by *George Carter* and his father, *Robert W. Carter*, with *Cooper*, dated

NOVEMBER, June 23d, 1792, reciting that "*George Carter* being indebted 1816. "to *John Cooper* 1893l. 18s. Od., monies won at play," therefore
 Carter's Ex- *Robert W. Carter* and *George Carter* agreed to mortgage *Rippon*
 cutors *Hall* estate to *John Cooper*, for payment of 100l. per annum,
 v. 'till said debt should be discharged, without interest; and, if
 Cutting and *any* of it should remain unpaid at the end of 20 years, then
 Wife. the said estate should be sold for payment of the balance;
 that *Robert W. Carter*, by his last Will, gave to his son, *George*
Carter his *Rippon Hall* estate, and the *Park Estate* in *Stafford*,
 and (reciting that he had become surety for payment of *Cooper's*
 debt,) charged the *Park Estate* with the payment thereof, in manner
 stipulated by the agreement with *Cooper*, deposited in the hands
 of *Mace Clements*, "which must be produced to the said *George*
Carter, his Executors, &c., at every period of payment, that
 "each payment may be endorsed on said agreement;" that the
 Will of *George Carter* directed payment of all his just debts,
 out of the sale of his Loudoun Lands; that two payments, of
 100l. each, were made by *Robert W. Carter* towards this debt;
 that several assignments were made on a copy of the agree-
 ment; that *George Carter* gave an obligation to *Samuel Tyler*,
 one of the assignees, dated July 14th, 1799, reciting that *Tyler*
 intended to purchase the claim, and promising, if he did so, to
 pay it to him, and that *George Carter* would pledge to *Tyler*
 the rents of his *Stafford* estate to secure the payment.

The plaintiffs also excepted to the allowance of the half per cent. brokerage in the Stock Account; and of ten per cent. commissions, upon bonds not put in suit, and sales of lands where no title was contested. Their other exceptions need not be mentioned, as no opinion was given upon them by the Court of Appeals.

It was proved by a witness, that the papers, evidences of debt, &c, belonging to the estate of *George Carter* were first put into *Landon Carter's* hands after the death of *Thomas Ludwell Lee*; and that the surviving Executor also took possession of the lands remaining unsold.

At February Term, 1814, the Chancellor, rejecting the Accounts taken by the Commissioner, which were irrelevant to the issue in this case, and contrary to his ninth instruction, and disapproving of his third instruction, decreed that the defendant, *Mrs. Lee*, Executrix &c., *de bonis testatoris*, if so much,

&c., if not, then *de bonis propriis*, pay to the plaintiffs, *John B. Cutting* and wife, \$1860 53, (balance due from her to them, as per Commissioner's last Report) with interest from April 7th, 1813 ; that the same defendant, in like manner, pay into the *Farmer's Bank at Fredericksburg*, to the credit of this suit, and subject to the future order of the Court, \$16,997,20, (principal due the estate of *George Carter*, deceased, as per same Report) with interest from April 7th, 1813, to be computed on the principles stated in said Report ; that the same defendant, in like manner, pay into the same bank, to the credit of this suit, and subject to future order, \$1724, 89, (balance due to *Sally Carter's* estate, as per said Report.) with interest from the same day ; that the plaintiffs, *Cutting* and wife pay the defendant, *Landon Carter*, \$456 76, (balance due from them to him, as per said Report) with interest from the same day ; that the defendant, *Landon Carter*, pay into the same bank, to the credit of this suit, and subject to future order, \$957 34, (balance due from him to *Sally Carter's* estate, as per said Report.) with interest from the same day ; and that the same defendant pay into the same bank, to the credit of this suit, subject to future order, \$12,723.92 (balance due from him to *George Carter's* estate, as per same Report) with interest from the same day. The Chancellor declined deciding as to the rights of *Sally Carter*, deceased ; there being a suit pending, to contest the validity of her Will. *Cutting* and wife were required to give bonds for refunding, in case of debts coming against the Testator's estate. As to the defendant, *George Carter*, against whom no decree was sought, the Bill was dismissed : and liberty was reserved to any party interested, at any time, to apply to the Court for disposition of the monies paid into the bank to the credit of the suit. *Costs* were awarded against the defendants, *Landon Carter* and Mrs. *Lee*.

From this Decree the defendants appealed.

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The case was argued, on the 15th, 16th, 18th, 22d, and 23d days of March, 1816, by *Leigh* and *Wirt* for Mrs. *Lee* ; *Wickham* for *Landon Carter* ; and *Call*, *Williams*, and *John B. Cutting* himself, for the Appellees.

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*On the part of the Appellants*, it was contended, that, under the peculiar circumstances of the case, the Executors should have been charged with principal and legal interest only, and not with the estimated amount of United States six per cent. stock and dividends, as if the fund had been invested therein ; and that, even supposing that principle to have been rightly assumed at all, it had, in its actual application by the decree, been stretched beyond the bounds of reason and equity.

The Executors were not guilty of any neglect to make a proper application of the surplus arising from the Loudoun sales. The *Cash* payments were absorbed in the payments of debts : it will not be pretended that the proceeds of *them* should have been vested in stock. The *Credit* payments fell due in 1804, 5, and 6 ; that is, a part within less than two, and the rest within about three years before the institution of this suit, and within a much less time before the death of the Executor, *Lee*. The suit was brought in December 1807. Let it be considered that the plaintiffs called on the Chancellor to take upon himself the execution of the trust ; that the Trustees might be at any moment called upon (as they well knew) to pay up the balances in their hands, in cash, to the Receivers of the Court, and it will be thence clear, that they did right not to invest the money, not to proceed in the execution of their trust, but to hold the balances subject at any moment to the disposal of the Chancellor. It was not equitable, therefore, to require an investment of the money after the institution of the suit. Neither ought they to be mulcted, as for a breach of trust, because they did not invest it before the suit brought. The money came into their hands, at different times, in the course of about three years ; counting, from the dates when it fell due, to the commencement of the suit. In that space of time, they had, 1st, to collect it : 2dly, to liquidate and collect their Testator's credits, and to pay his debts : (he had been improvident ; all his affairs were in confusion ; there was hardly any knowing when the debts were all paid off :) 3dly, to settle their accounts, and ascertain the *balance* in their hands, which alone they were bound to invest in stock ; and 4thly, to make the investment upon the best terms, which required time. Were three years too long a time to be allowed for all these things ?

It is true that it now appears there were balances in their hands, that might have been invested within that time : but the Court must consider the situation they were in at the time, and judge their conduct accordingly : it must ask, could the trustees then have known, that debts to no greater amount, than now appears to have been due, would be brought against the estate ? Could they have estimated, with any certainty, the amount of outstanding debts ? If not, could they, without gross imprudence, so invest the fund, as to be unable to command it in cash, at any moment, without a sacrifice ?

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While the Court should take care, on the one hand, that Executors do not abuse their trust, it should guard, on the other, against making the executorial trust so burthensome and dangerous, that no man will be willing to undertake it, for the benefit of the creditor, the widow and the orphan. It appears, then, that the impatience of the plaintiffs in bringing the Trustees before the Chancellor, and putting the trust into his management, in so short a time, as allowed not of the performance thereof by themselves, is an abundant excuse for their not performing it.

This excuse holds as to both Executors, but much more strongly in favour of *Lee*. (1) He died early in 1807, eight or nine months before the suit was brought : he had so much less time, then, for the performance of his trust ; and for some time before his death, he was in extremely bad health, unable to transact business. And if *he* had not time to make the investment, surely his Executrix should not be held answerable for not making it : for she was not *George Carter's* Executor ; the executorship survived to *Landon Carter*, and she was not bound to execute the trust, but only answerable for her Testator's breach of trust.

*On the other side*, it was said that the Testator intended the investment of the money in stock as a provision for his wife in lieu of dower, and for the maintenance of his children. It should therefore have been done as soon as possible. The first sales were in April, 1803. *Lee* purchased at that sale upwards of 1000*l.* : he was also a purchaser at the second sale. The two Executors purchased nearly one half of the whole

(1) Note. This part of the argument was urged by the counsel for Mrs. *Lee*.  
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amount of sales. A court will hold a Trustee bound to reasonable diligence. These gentlemen ought at least to have collected from *themselves*: they were chargeable for the money they owed, on the days when the sums fell due. But they kept not only the money and interest, but the profits of the lands which they had purchased; leaving the widow and children almost in a state of starvation.

Trustees are liable for any injury resulting from a breach of trust. (a) Even if they *mistake* their duties, they are liable. (b) And if no good reason appears for their failing to apply *profits* to the use of the *cestuy que trust*, they may be compelled to pay interest thereon from the time of the receipt thereof. (c) A Court will consider that as done, which ought to have been done, as between *cestuy que trust* and Trustee.

(a) 1 Cruise.  
554, § 43;—1  
Bro. Ch. Cases,  
68. Borden v.  
Mossman.  
(b) Earl Pomlet  
v. Herbert, 1  
Vesey jr. 297.  
Porock v. Red-  
dington, 5 Ve-  
sey jr 794.  
(c) Quarles's  
Executor v.  
Quarles, &c., 2  
Murf. 321.

In this case, the Executors failed to give Mrs. Cutting the dividends, which would have been principal money to her: if, therefore, she gets only her principal and interest upon it, she gets nothing for her interest. The Executors did not want time to find out the situation of the estate. T. L. Lee, from his previous acquaintance with it, residence, &c. knew all about it. In 1805, there was a large balance in his hands, which ought to have been invested.

The institution of the suit ought not to stop the dividends; for the suit did not stop the claim of the plaintiffs. If the Executors had made the investment, they would have had the stock in hand, ready to be paid when after debts should have appeared. The defendants are properly charged with the stock at the price of the day, when it should have been purchased; for that is the actual damage sustained by the plaintiffs. (d)

(d) Groves v.  
Graves, 1 Wash.  
1.; Shepherd,  
Executor, &c. v.  
Johnson, 2 East.  
211.

The Counsel for the Appellees also objected to the Decree, on the ground that the payments to Cooper's gaming debt ought not to have been credited to the Executors.

The Contract itself was void, and the provision concerning it in the Will of Robert W. Carter was also void by virtue of

(e) Rev. Code,  
1st vol ch. 96.  
sect. 1. p. 174  
(f) 6 Bac. 338,  
389; 3 Bac. 339;  
2 Atk. 467,  
Fleethood v.  
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the Act against gaming. (e) which is to be extensively expounded for suppression of that odious vice. (f) Indeed, without any extension, the words of the Act are sufficient for our purpose; for Wills are "Conveyances;" being treated as such

by text writers ; (a) and that idea is recognized by the Courts. (b) They are also "Securities;" for they are Common Assurances, (c) and in England pass as a muniment of title.

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The devise in this case comes within the meaning of the Statute, because within the mischief intended to be prevented; for it is a provision for payment of a gaming debt, and therefore should no more prevail, than a gift to uses. Its being the act of a third person, who was no party to the gaming, does not make it valid; for it is equally affected by the vicious origin of the Contract; (d) being contrary to the policy of the Statute, which treats gaming, as a public evil, and is meant to protect the *loser* and defeat the *winner*. The Contract indeed was reprobated by the common law as well as the Statute; for the gaming was excessive, *fraudulent*, and in a tavern; (e) and therefore Grants and Devisees founded on it are necessarily void. (f)

(a) *Lilly on*  
*Com.* 96, 98 ;  
6 *Cruise's Dig.*  
8 ; *Hale's Anal.*  
94.  
(b) *Fisher v.*  
*Nicholls*, 3 *Salk.*  
127 ; *Hogan v.*  
*Jackson*, *Comp.*  
306.  
(c) *Shep.*  
*Touch* 2. *id.*  
399.  
(d) *Hussey v.*  
*Jacob*, *Com Rep.*  
5 ; *Ld Ray* 37,  
*same case* ; *Jef-*  
*fries v. Walter*,  
1 *Wils.* 220 ;  
*Woodson and*  
*Royser v. Bar-*  
*rett & Co.* 2 *H.*  
*and M.* 80.  
(e) 3 *Bac.* 336 ;  
*Firebrasse v.*  
*Brett*, 1 *Vern.*  
489 ; and 2  
*Vern.* 70 *S. C.*  
(f) *Swinb.* 5 ;  
*Shep. Touch.*  
433.

The provision in *Robert W. Carter's Will* was void by the testamentary law; because the Testator was *mistaken*; for he supposed the obligation *binding*; and that mistake avoids the devise. (g) It does not appear to have been for the sake of the *honor* of the family, but to discharge the debt, for payment of which the Testator considered himself bound as *surety*.

(g) *Newl. on*  
*Contr.* 432 ;  
*Swinb.* 482.  
(h) *Young v.*  
*Moore*, 2 *Wils.*  
67.  
(i) *Hollis v.*  
*Carr*, 1 *Vern.*  
431, 432.  
(k) *Burke v.*  
*Jones*, 2 *Ves.*  
275, 291.  
(l) *Newl. on*  
*Contr.* 157. 1  
*Ves.* 254.  
(m) *Toller.*  
223 ; 3 *Bac.* 78.

The case is not aided by the clause in *George Carter's Will* directing the payment of "*all his just debts*;" for, in the eye of the law, this was not a *debt* at all; (h) and it certainly was not a *just* debt. Such devises are not applied to claims founded in *maleficio*, (i) but only to such as the law will enforce. (k) The devise is not to *Cooper*, but to the *debt*; so that, to recover the legacy, the *debt* must be shewn; and then the Court will not sustain a suit for it. (l)

The voluntary payment of this debt by the Executors was a breach of trust, and a *devastavit*; for it varied the situation of the parties, and put the winner in possession, when the law would not have helped him. (m)

On the other side, it was said that, however the debt was originally contracted, it became, by the agreement of June 23, 1792, the debt of *Robert W. Carter*, as well as of *George Carter*. The question then is, had not *Robert W. Carter* a



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right to pay this debt, if he chose to do so? And if he did pay it, or (which is the same thing) provide for its payment; can *George Carter's* devisees object, because it was originally a gaming debt of *George Carter's* own? *Robert W. Carter*, by his Will, charged the *Park* estate with the payment of this particular debt, and, *subject to that charge*, devised the estate to *George Carter*. Suppose he had paid the debt in his life time, and expressly declared in his Will that he deducted the amount from what he gave his son; could the sons devisees now complain?

The general words of the Statute are relied on; that all securities for payment of gaming debts shall be utterly void: but it does not follow, that they may be avoided by any and every person, against any and every holder, under all possible circumstances. The cases of *Buckner v. Smith*, 1 Wash. 296, and *Hoomes v. Smock*, *Ibid.* 389, prove that there are circumstances, under which gaming debts will be binding on debtors, notwithstanding the strong words of the Statute. *George Carter's* assurances of payment to the assignee, *Tyler*, were an express recognition of the trust, on which he took the *Park* estate; and enured to the benefit of the subsequent assignees. Those assurances were dated the 14th of July 1797; the assignment to *Tyler* was on the 27th of the same month. Very possibly, the debt was offered to *Tyler*, without any explanation as to its character, and only with an estimate of its value. There is no evidence to shew, that *Tyler* knew its character at the date, when he received *George Carter's* assurances of payment: and if he did not, the case falls within the principle of *Buckner v. Smith* and *Hoomes v. Smock*.

But, suppose advantage may be taken of the unlawful character of the debt, to avoid the charge of it upon the *Park* estate; who may take such advantage? Not *George Carter*, the devisee, nor his devisees, but the heirs of *Robert W. Carter*

only, by the words of the Statute. (a) As to *George Carter*, he was a purchaser of the estate, subject to this charge and condition of paying *Cooper's* debt, and must fulfil the same, or yield the estate, or a just proportion of its value, to the heirs of *Robert W. Carter*. All that his Executors did was to take in that debt, to relieve the *Park* estate, for the benefit of his widow and children, to whom it was devised; and whatsoever

(a) Rev. Code  
1st Vol. ubi su-  
pra sect. 2.

either of them paid towards the debt ensured to that effect. The payments, therefore, were a fair credit to them, in account with the estate.

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The office of an Executor is one of much trouble and danger; and his labours are generally rewarded with ingratitude. It is but to throw a little more rigor upon the office, to drive every prudent and honourable man from undertaking it, and to place it in the hands of harpies or Sheriffs.

The Courts do not adopt the rigor of distributees. Thus, although it be the duty of Executors to settle Accounts, yet if the failure be an act of mere negligence without advantage to the Executor, he shall not be punished for the omission. (a) So, an Executor cannot release a debt; but if he compound, *bona fide*, without benefit to himself, and with a view to benefit the estate, he shall not be prejudiced by it. (b) Wherever he acts with that intention, *bona fide*, he shall not suffer by the act, though mistaken in his judgment; as in calling in debts standing out at interest, (c) or in lending money on security which fails. (d) So, if, with reference to the honor of the family, an Executor pay a debt, it shall be allowed. (e) So, also, if an Executor pay money to one named Co-executor, who never qualified, and died insolvent, or to a Clerk to pay over, who absconds, the uprightness of his views saves him from a charge. (f) The result seems to be that, if an Executor pay a debt, believing it to be his duty so to do, with no reference to his own advantage, but with a single eye to that of the estate for which he acts, he ought not to be held personally responsible for it, although the debt may not have been strictly demandable at law.

(a) *Jones v. Williams*, 2 Call, 102.

(b) *Toller*, 482.

(c) *Newton v. Bennett*, 1 Bro. Ch. cases, 361.

(d) *Brown v. Litton*, 1 P. Wms 141.

(e) *Wallis v. Everard*, 11 Finer 432. *The Executors* (C.c.) pt. 8.

(f) *Bacon v. Vasey*, Bacon, 5 Vasey, jr. 330.

In reply it was said, that the Executors were not excuseable in this case, because the written agreement shewed, on its face, the debt to have been for money won at gaming. If Robert W. Carter had given a bond it would have been void: if so, the provision in his Will was equally void. The charge on the Park estate was not a condition precedent, but subsequent: it was therefore void, and the estate passed, unincumbered, to the devisee.

The principles upon which *Buckner v. Smith*, and *Hoopes v. Smock* were decided, do not apply to this case. In both

NOVEMBER, 1816. those cases, the person relieved was an innocent purchaser, who was induced to take the bond, by the conduct of the obligor, without knowing its unlawful consideration. But *Tyler* the assignee in this case *must have known, before he took the assignment*, the true nature of the debt he purchased.

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*Tuesday, Nov. 19th, 1816.* The following was entered as the Opinion and Decree of the Court. (1)

In passing an opinion upon this long and complicated case, in which the Decree of the Court of Chancery seems predicated upon the fourth Report made in the cause, the Court will confine itself to that Report; to the exceptions of the parties thereto; and to points made by the Counsel respectively; considering that any inferior and subordinate points, not brought before the Court in one or other of these modes, have been acquiesced in by the parties.

With respect to the exception of *Mrs. Lee*, the Executrix of *Thomas Ludwell Lee*, an Executor of *George Carter*, against the payment of nearly two thousand seven hundred dollars, which, she alleges, were improperly charged to her, on the ground that the evidences of the credits constituting that item were put into the hands of *Landon Carter*, the surviving Executor of *George Carter* deceased, who, she alleges, has collected, or is in progress to collect them; the Court is of opinion that the same was rightly disallowed, because the Appellees ought not to be turned around to the surviving Execu-

(1) Note. The Courts' opinion was read by Judge ROANE a few days before, but re-considered in consequence of some suggestions from the Bar. In pronouncing it on this day he made the following remarks on the part of the Court:

The Decree is now to be entered precisely as it was reported the other day, the Court only striking out so much thereof, as might be supposed to imply that each Executor is liable for the acts of the other; a point unnecessary to be decided in this case, and which is therefore left open for future consideration and decision.

With respect to the Costs, the Court is clearly of opinion that the Appellees will gain by this decision more, than they got by the Decree complained of. They will gain more money, though perhaps some particular items may have been erroneously decided in their favour; and therefore the Appellants were not aggrieved by that Decree, but the contrary. The Appellees were injured thereby, and are now to be considered as the party substantially prevailing. The Court is also of opinion, that, as the two Executors joined in this appeal, they cannot be separated in awarding the Costs.

tor, on grounds, of the existence of which they may have been ignorant, and when she has not furnished them with the means of charging the said surviving Executor therewith. The supposed hardship of this decision upon Mrs. Lee may however, be obviated, in taking the accounts between the two Executors of *George Carter*, in pursuance of this Decree, when each Executor is to be charged with the sums appearing due by him, by the evidence exhibited; which accounts are hereby directed to be taken accordingly: and, as to the interest on this sum, it follows as an accessory to the principal.

As to the private account of the Appellant *Landon Carter*, with the estate of his Testator *George Carter*, the Court is of opinion it was proper to be adjusted in this controversy, although it may not have been specifically and particularly put in issue; and that an account thereof ought to have been taken. With respect to the accounts of *George Carter* with the estate of *Robert W. Carter*, the Court is of opinion, that, as it was the duty of *Landon Carter*, as Executor of *George Carter*, to collect and apply debts, due to that estate from the estate of *Robert W. Carter*, it was also proper to adjust those accounts in this suit; the said *Landon Carter* being Executor to both estates.

The Court is farther of opinion, that, as the sums paid by *Robert W. Carter*, on account of *Cooper's* debt, herein after mentioned, were never reclaimed by him in his life time; but, as, on the contrary, he provided a fund, by his Will, for the payment of the balance of that debt, they should not now be claimed from the estate of *George Carter*, but be considered as a payment, or advancement to him, and, as such, extinguish the previous accounts of *George Carter* against his father, which are stated to have been of inferior amount. The last mentioned account is to be taken separately, however, from the private account of *Landon Carter*.

The Court is farther of opinion, that *Cooper's* gaming debt ought not to be allowed to the Executors of Mr. Lee in the settlement of his accounts. That debt, if not stamped with fraud and imposition in its very origin, carries evidence, on the face of the instrument, by which it is supposed to have been guaranteed, that it arose for money won at gaming. Of the terms of that instrument, none of the subsequent holders

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are *proved*, or can be *supposed*, to have been ignorant ; and the transaction is proved to have been of general notoriety. As to the Will of *Robert W. Carter* in relation to this debt, it was not made in favour of *Cooper*, or any of his assignees. It added no new sanction, and gave no new character to this claim. It imposed no new obligation of payment on *George Carter*, as a *condition* of the devise to him, which relates to it. That devise was made in favour of the Testator himself and his estate, by substituting a *particular* fund in lieu of his previous liability. It could not bind *Cooper* to waive his prior ground of claim, and rely on the substituted fund. It was made by *Robert W. Carter*, as a *surety* for *Cooper's* debt, and probably under an idea that he was bound to pay it. It results, from these considerations, that the Executor of *George Carter* ought not to have paid this debt ; and, whatever his motives may have been for the haste, with which he proceeded to compound and discharge the same, they cannot vary in his favour the general principles, by which this debt stands reprobated as aforesaid.

The Court approves of the principles, embraced by the sixth instruction of the Chancellor in the proceedings contained ; namely, " that the money, directed to be invested in " Government Securities, should be accounted for, as if invested, after a reasonable time for that purpose, &c. ;" with this exception, that the Executors should not be charged with *interest thereon during such reasonable time* ; it being presumed that, during such time, the Executors would not use it for their own purposes, but would keep it by them for the purposes of making such investments. As to the claim of interest upon the dividends of such investments, supposing them made, the Court is of opinion that, although such dividends were intended for the support of the Testator's family ; and although, if such investments had been made, the dividends might have probably been received without difficulty, on application at the proper offices ; yet, as they were not in fact received, no interest should be allowed on such dividends. The farthest the Court has gone is to allow interest upon rents, hires and interest, *when actually received*.

The allowance of such interest, in this case, would open a wide field, in relation to this subject ; and the principle might

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be equally relied on in all other cases, in which it might be *presumed* that the interest, though not in fact received, *might have been* obtained on application. As to what was said of its being unknown to the Executors what was the amount of the debts of *George Carter*; and that, therefore, they could not safely make the investments at an early period of their Executorship, the Court remarks; 1st, that those debts, though perhaps large, were probably not numerous; and, 2dly, and chiefly, that if such investments had been made by the Executors in their own names, as such, (as they ought) the stock could at any time have been converted into money, and applied to the payment of the debts of their Testator.

With respect to *Beale's* bond, and all the other items of the private accounts of *Landon Carter*, and of the estate of *Robert W. Carter*, with that of *George Carter*, other than those relating to the sums paid to *Cooper* as aforesaid, the Court passes no opinion upon them, as those accounts remain to be taken by a Commissioner.

As to the Commissions charged in this case, the Court is of opinion that, although, under peculiar circumstances, an allowance may be made to Executors, in addition to the Commissions given to Attornies for the collections of debts confided to them, such additional Commissions ought not, in general, to be given, where the debtors reside in, or near the neighbourhood of the Executors, who, consequently, might easily collect the monies themselves.

Therefore it is decreed and ordered, that so much of the Decree of the said Court of Chancery, as conflicts with the principles now stated, be reversed and annulled; and that the residue thereof be affirmed; and also that the Appellants out of the estates of their Testators in their hands to be administered, if so much thereof they have, but if not, then out of their own estates, pay to the Appellees, being the parties substantially prevailing, their costs by them about their defence in this behalf expended. And it is ordered that the cause be remanded to the Court of Chancery, to be there finally proceeded in, pursuant to the principles of this Decree.

Decided, Nov.  
20th, 1816.

## Warners against Mason and Wife.

1. A Testator gave to his son *W.* a tract of land, "during his natural life, and then to his heirs lawfully begotten of his body, that is, born at the time of his death, or nine Calendar months thereafter ; and, for want of such heirs; then to his son *I.*'s two sons, *Jacob* and *George* ; one of them to set a price on the whole of it, and give or receive one half of that sum from the other." This was a good limitation, by way of contingent remainder, to *Jacob* and *George*.

*WILLIAM WARNER* the elder, late of the County of Accomack, made his last Will, dated June 20th, 1803, and devised to his son *William Warner* a tract of land, by the following words: " I give to my son *William Warner* my sea side plantation adjoining the lands of *Thomas Evans*, Esq. during his natural life, and then to his heirs lawfully begotten of his body, that is, born at the time of his death, or nine Calendar months thereafter ; and, for want of such heirs, then to my son *Isaac's* two sons *Jacob* and *George* ; one of them to set a price on the whole of it, and give or receive one half of that sum from the other: I also give to my son *William* all the timber and scantling which he has got or sawed for the purpose of building a house on the plantation I have given him."

The Testator died, and *William Warner* the son entered, and died seized, without having had any issue, and having devised the land to his sister, who became the wife of *Charles Mason*.

*Jacob* and *George*, the sons of *Isaac Warner*, brought an Ejectment against *Mason* and wife, in the County Court of Accomack, to recover the said sea side plantation ; on the trial of which action, a case was agreed by the counsel on both sides, stating the facts aforesaid.

On this case, the County Court gave Judgment for the plaintiffs. The Superior Court of Law reversed that decision ; and the plaintiffs appealed to this Court.

*Nicholas for the Appellants.* The question is whether the limitation over to *Jacob* and *George* was good, or not.

I contend that *William Warner*, the first devisee, took only an estate for life. It is an express estate for life in terms, and then to his heirs lawfully begotten. I do not say that an express devise for life will in all cases prevent the rule in *Shelley's* (a) 1 Co. Rep. 89. case (a) from prevailing: the general rule is, that the first devisee will take an estate in tail, which by the Act of Assembly becomes a fee simple ; yet all the Judges agree that this rule is against the Testator's intention. I admit that the rules of law

are not, in *every case*, to be controlled by the intention of the Testator; but, where any expressions are found in the Will, shewing the devise to the second devisee to be to him, as a *purchaser*, the Court will lay hold of those expressions in support of the intention. (a) *Shelly's case* only shews, that where the limitation over is to the heirs of the body, *generally*, it vests an estate of inheritance in the first devisee; that the word heirs, in that case, is a word of limitation, not of purchase. But neither that case, nor any other, was ever intended to control the intention, obviously expressed, that the second devisee should take by *purchase*, and not by *descent*. Here the words "*heirs lawfully begotten*" were plainly intended, not as words of limitation, but as *designatio personæ*; which is evident from the Testator's describing those heirs, as persons "*born at the time of his death, or nine Calendar months there- after.*"

The word "*heirs.*" in this case, is therefore a word of *purchase*, and not of *limitation*. (b) And that limitation is not too remote.

*Wickham contra.* A person, not conversant with rules of law, would suppose that this case ought to be determined against me. The intention of the Testator certainly was to give an estate for life to *William*; but he intended also to give something to *William's heirs*; and they can take such estate only, as the law permits. His general intention must therefore control his particular intention.

I contend that *William Warner* took an *estate tail*. His children (should he have any) could not claim by way of Executory devise, but by way of contingent remainder: (c) "*for*" "*where a contingency is limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall never be construed to be an Executory devise, but a contingent remainder only, and not otherwise.*" (d) If therefore the contingency was too remote to permit the remainder to take effect, the children of *William Warner* could only take by construing the devise to him as an estate tail.

All the subsequent cases either conform, or profess to conform to the rule in *Shelly's case*, according to which the heirs of *William Warner* could not take by purchase, but by descent;

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(a) *Coole's Analysis of Fearn's*, p. 38. *Fearn's*, (4th Ed.) 76; 2 *Bl. Com.* 241.

(b) *Bamfield v. Popham*, 1 P. Wms. 59; *Burchett v. Durdant*, 2 Vent. 311; *Brewer & Wife v. Opie*, 1 Call 212; *Higgenbotham v. Rucker*, 2 Call 313.

(c) 2 *Bl. Com.* 173.

(d) 2 *Saunders*, 388. *Purefoy v. Rogers*, note (9.) 3 *Term Rep.* 763. *Dox v. Morgan*.



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and this is considered a principle of law never to be departed from. (a) This rule is not at all founded on the Statute *de donis*, but applies to estates in fee as well as tail; to Wills as well as Deeds. In the case before us, the devise to *William Warner* is not merely an *implied*, but an *express* estate tail; for the intention of the Testator must be consistent with the rules of law, and he cannot create new modes of descent. (b) If the heirs take by *descent*, the ancestor must have an estate of inheritance; as is also stated in the case of *Jones v. Morgan*. (c) In which the rule is laid down by Lord THURLOW with great accuracy and clearness.

(a) 5 Bac. 731; *Harg. Law Tracts*, 489, *Blackstone's Argument in Perrin v. Blake*; *Ibid.* 551. *Hargrave's own op.* *Robinson v. Robinson*, 1 Burr. 38; 6 Cruise 239. (b) *Coulson v. Coulson*, 2 Str. 1125. (c) 1 Bro. Ch. cases 219. Suppose *William Warner* had died, leaving a grandson living; would he not have taken? Yet he could not, according to the argument of Mr. *Nicholas*: for he reads this Will as if the word used in it were "*sons*" instead of "*heirs*," excluding all *grandsons*; which could not have been the intention of the Testator. The law term "*heirs*," used by himself, includes *grandsons*, and ought always to be construed as meaning "*heirs*," unless a contrary meaning be *necessary*.

I admit there are exceptions to the rule in *Shelly's* case: (d) as where the limitation is to "*sons*" or "*children*;" (e) or where words of limitation are superadded to the word "*heir*," in the singular number. (f) So if the devise be to A. for life, remainder to his heirs "*now living*," this confines it to the children now living, and excludes the rule in *Shelly's* case: but whenever "*all his heirs*" are to take at the time of his death, there the rule applies.

But if *William Warner* took an estate for life only, the devise over by way of contingent remainder is too remote. (g) *Dox v. Cooper*, 1 East 229, 6 Cruise, 205; *Hill v. Burrow*, 3 Call. 342; *Tate v. Tully*, *Ibid.* 354; *Edridge v. Fisher*, 1 H. and M. 550. The case of *Sydnor v. Sydnors*, 2 Munf. 263, was as plain a case of intention, as ever came before a Court; yet there it was decided that the limitation was too remote; for there is no such thing, as an Executory devise taking effect after an estate tail: the Court considering the estate of the first devisee to be an estate tail, it was therefore turned into a pure and absolute fee by virtue of the Act of Assembly; according to *Carter v. Tyler*, 1 Call. 187.

In *Smith and Wife v. Chapman*, 1 H. and M. 240, the distinction taken was that the devise over was to "*children*." In *Brewer v. Opie*, 1 Call 212, the word "*or*" being considered

by the Court equivalent to "and," both the contingencies were confined to the period of the life of the first devisee: that case has therefore no bearing on this: *Higgenbotham v. Rucker* was a case of *personal* estate; in which, too, the word "children" was greatly relied upon. *Bamfield v. Popham*, 1 P. Wms. 54, has always been considered of doubtful authority. *Coze's* new edition shews this. In *Roy v. Garnett*, 2 Wash. 24, it is denied to be law, and said to have been overruled by *Blackburn v. Edgley*, 1 P. Wms. 605. Independent of all this, the devise was to *Popham* for life, remainder to his "first son," and so to every other son in tail male.

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*Nicholas in reply.* Most of the cases cited by Mr. Wickham are not important in this case, because they relate to distinctions between Executory devises, and contingent remainders; and whether my clients take by one or the other, they are equally entitled to recover: for, admitting they cannot take by Executory devise, yet if the first devisee took an estate for life, and the contingency be not too remote, the limitation over to them is good, as a contingent remainder. I deny that *Shelley's* case applies to this. Mr. Wickham has shewn that there are many exceptions to the rule in that case. This narrows the ground of inquiry to the question, does this case present one of those exceptions?

Almost all the exceptions to *Shelley's* case turn on the intention of the Testator.(a) I admit that an express devise for life is not of itself sufficient, but it may be resorted to as evidence of (a) 6 Cruise. 344. the intention, in aid of other words. There is no rule of construction of Wills which ties down the Testator to particular words. Any that are equipollent, or used as synonymous, with "sons," or "children," will have the same effect. The word "heirs" is not used in this Will in the technical, but in the popular sense; being evidently intended to mean "children," and not grandchildren, or any more remote heirs, or issue.

A similar argument to that of Mr. Wickham in relation to grandchildren, was used in *Smith and Wife v. Chapman*, and overruled. That case is a very strong authority in my favour.

In *Doe v. Laming*, 2 Burr. 1100, (b) it is said by Lord (b) 6 Cruise. 347. Mansfield, that "as there was no rule of law that prevented

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"*heirs* taking as *purchasers*, where the intention of the Testator required it, so he was of opinion that the words "*heirs of the body*" were words of *purchase*," in that case.

The reasoning in *Jones v. Morgan*, 1 Bro. Ch. cases, 219, is supposed to militate against the pretensions of my clients; but the words used in the devise over in that case were clearly words of inheritance, not of purchase. In Lord THURLOW's argument there is a strong implication that the word "*heirs*" may in some cases be considered not words of limitation.

Even where there is *no express estate for life*; but words of explanation are added to the word "*heirs*," shewing that the Testator meant to use it only as a description of the person, or persons, to whom he intended to give the estate after the death of the first devisee; the word "*heirs*" will operate as a word of purchase, and the first devisee will take an estate for life. (a) These cases shew that the particular words "*sons*," or "*children*," are not necessary to be used; but any words sufficient to explain the intention will answer the purpose.

(a) 6 Cruise, 346; *Low v. Davies*, 2 Ld. Raym. 1561; *Doe v. Laming*, *supra*.

The cases of *Doe v. Cooper*, *Hill v. Burrow*, *Tate v. Tally*, *Eldridge v. Fisher*, and *Sydnor v. Sydnors*, are none of them like *this*, in which the limitation over was to take effect upon a contingency happening *within nine months after the death of the first devisee*; but were all cases of limitations depending upon indefinite failures of issue.

Wednesday, November 20th, 1816, Judge ROANE pronounced the Court's opinion, that the Judgment of the Superior Court of Law be reversed, and that of the County Court affirmed.

Decided, Nov.  
27th, 1816.

### Green against Bailey.

THIS was an action of Debt on a Bond, brought by the Appellee against the Appellant. The declaration was in the form of an Award to be made by certain Arbitrators; the condition being made a part of the Record by Oyer, and the defendant having pleaded "Conditions performed;" the plaintiff may set forth the Award, and aver a breach of the condition, by a special Replication, not having done so in his Declaration: but if he neglect to do this, and reply generally, judgment ought to be arrested, after a verdict in his favour.

2. In such case, the proceedings, subsequent to the plea, should be set aside, and a Repleader awarded.

usual form on a plain bond, saying nothing of any condition. The defendant prayed *oyer* of the Condition of the Bond; (from which it appeared to be a Bond, for submitting to the Award of certain Arbitrators, mutually chosen, all controversies between the parties;) and pleaded Conditions performed. The plaintiffs replied *generally*; and in the transcript of the Record these words were added, "and general rejoinder and is-  
"sue :." A Jury were empannelled, who found for the plaintiff, and assessed his damages to the sum of \$400,84 cents, the principal sum due; to bear interest from the 13th of October, 1803, 'till paid; and judgment was entered accordingly; to which a Writ of *Supersedeas* was awarded by a Judge of this Court.

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*Williams for the plaintiff in error.* The plea being Conditions performed, the plaintiff ought to have set forth the Award by *Replication*. In fact no issue was joined in the cause; according to the cases of *Stevens v. Takiaferro*, 1 Wash. 153; *Kerr v. Dixon*, 2 Call 379; *Taylor v. Huston*, 2 H. & M. 161; and *Hite's heirs v. Wilson and Dunlap*, *Ibid* 268.

It appears, too, from a copy of the Award, inserted in the transcript of the Record, that it was made three or four months after the suit was brought.

*Wickham contra.* Nothing is spread upon the Record but the Bond: the date of the Award is therefore of no consequence.

I contend that this is only an *informal* issue, cured by the Act of Jeofails. The plaintiff never could have got a verdict without proving that an Award was made. The plea of "*Conditions performed*" admitted the Award. *Kerr v. Dixon* was a case of a defective *plea*. In *Taylor v. Huston*, the words "*Usual Plea*" were alone put in.

In many cases this Court has affirmed Judgments where the plea was the word "*payment*," and "*plaintiffs replied generally*." So "*nil debet and issue*."

*Williams in reply.* It is laid down in *Levins*, that the Award must be set forth. In Debt on a Bond with collateral Condition, the plaintiff must assign a *specific* breach. In *Covenant*, it is

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otherwise ; a general breach, in the terms of the agreement, being sufficient. The general Replication here did not state in what particular the defendant had not performed the condition.

*Wickham.* By demanding *Oyer*, the Condition of the Bond is as much spread upon the Record, as if it were set forth in the Replication. *Oyer* incorporates the Condition with the pleadings.

*Williams.* It does not prove that an Award was made.

*November 27th, 1816,* the Judges pronounced their opinions.

**Judge COALTER.** This is an action of Debt on a Bond conditioned to abide by an Award, &c. The Declaration is in Debt on the penalty of the Bond : the defendant takes *Oyer* of the Bond and Condition, and pleads Conditions performed ; to which the plaintiff replies generally, and there is a general rejoinder and issue, and verdict and judgment for the plaintiff.

The first question which arises is, whether the pleadings and issue in this case are merely informal, and so aided by the statute of Jeofails ; or whether there is such substantial defect, that judgment cannot be given for the plaintiff on the verdict.

I at first doubted whether, as the plea in this case amounted, though informally, to an admission that an Award was made, and put the defence on the performance, it was a fatal error in the plaintiff, not aided by the statute, to omit, in his Replication, to set out the Award and assign a breach ; but I find it clear, on an examination of the authorities, that, where the plea is no Award, not only the Award itself must be set out, that the Court may see that it is a legal Award, but the breach must be assigned ; (a) for, as an Award may be bad in part and good in part, the Court is to judge whether the breach is assigned of a part that is good ; and, for this reason, there is more strictness required, as to assigning a breach, in cases of this kind, than in suits upon ordinary Bonds ; and therefore such defect is not cured by verdict. And even where the defendant set out that part of the Award which he was to perform, and pleaded per-

(a) 1 Sessd.  
 103 ; 1 Salk 138 ;  
 Hobart, 198,  
 233.

formance thereof, which the plaintiff denied and tendered an issue, without setting out what he was to perform, so as to shew the Award was mutual, and afterwards demurred to the defendant's Rejoinder, the Replication was considered as bad ; but the Court would not give judgment for the defendant, although it was on Demurrer ; thinking the plaintiff had been tricked by the pleadings, and therefore suffered him to discontinue. (a) I think, therefore, this case is not aided by the statute.

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(a) *Peale v. Warner*, 1 Saund. 326, 327.

The next question is, whether there ought to be a Repleader, or Judgment for the defendant.

I think there cannot be judgment for the defendant, unless upon the ground that the Declaration contains no cause of action, and, consequently, that the judgment must be arrested ; (in which case, the plaintiff must bring his suit again, and declare properly ; ) or because, *notwithstanding the verdict in his favour*, it sufficiently appears, on the merits, that the plaintiff cannot better his case, and therefore a Repleader would not avail him.

As to the first, there is no doubt but the Declaration is good ; and although the Oyer makes the Condition of the Bond, as it were, part of the Declaration, yet it is not to all purposes as much so as if it had been set out in the Declaration by the plaintiff himself : for if he had set it out, and had failed to set out the Award and assign a breach, the defendant might have demurred to the Declaration ; but, here, the defendant, on taking Oyer, could not demur ; he could only demur to the Replication, and rely on the defects in it above noticed. He unites, however, in the issue, and a verdict is found against him.

The rule as to Repleaders is that, where the issue is immaterial, the Court will award a Repleader, if it will be the means of effecting substantial justice between the parties, but not otherwise ; (b) and then they must begin again at the first fault which occasioned the immaterial issue. If the Declaration is insufficient, and the Bar and Replication are also bad, they must begin *de novo* ; but if the Bar be good, and the Replication ill, at the Replication : but a Repleader will not be awarded before trial, as the defect may be cured by the verdict. I cannot find any authority, nor can I discover any reason for a difference in this case from all other cases where the plea presents a bar which the plaintiff in his Replication, fails to remove and thereby to support his Declaration. Why remit the plain-

(b) 1 Chitty, 633 ;  
2 Saund. 319.

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tiff to his new action, when he may lawfully file the same Declaration again, and support his case by replying the Award, and assigning a breach ; into which error he may have been duped by the informal plea of performance by the defendant ?

It is true, if the plaintiff has shewn, or if that has appeared by a verdict for the defendant, that he cannot make his case better, then a Repleader, as it could not conduce to substantial justice, would not be granted.

- On this point the rule is that, where the party, for instance the defendant, confesses and avoids by such matter, as can never be made good by any manner of pleading ; then judgment shall be given against him, as upon his own confession, without any regard to the issue ; (a) but otherwise, where he avoids by such matter, as would have been sufficient, if it had been well pleaded. And the distinction between a Repleader and a Judgment *non obstante veredicto*, is this, that where the plea contains a defective title, or ground of defence, by which it is apparent to the Court, upon the defendant's own shewing, that, in any way of putting it, he can have no merits, and the issue joined thereon be found for him, then, as awarding a Repleader could not mend the case, the Court will at once *for the sake of the plaintiff*, give judgment for him ; but where the defect is in the manner of stating the defence, and the issue joined thereon is immaterial, so that the Court know not for whom to give judgment, there, *for their own sake*, they will award a Repleader : a judgment, therefore, *non obstante veredicto*, is always upon the merits, and never granted but in a very clear case ; a Repleader is upon the form and manner of pleading. (b)

This case, therefore, standing on a verdict for the plaintiff, and not on a Demurrer ; and this verdict being found on an issue, joined upon a good Declaration ; although the Replication has not supported that Declaration by clearly and sufficiently shewing a good cause of action ; notwithstanding the matter set out in the plea ; yet, as it does not shew, that the plaintiff *has no cause of action*, I must consider it, as resting upon the form and manner of pleading ; and, not being able to give judgment for either party ; not for the defendant, because there is a verdict against him on the issue tendered by himself ; nor for the plaintiff, because his Replication is insufficient, I must award a Repleader.

Judge BROOKE. After *Oyer* of the Condition of the Bond had made it a part of the Declaration, the plaintiff ought by his Replication to have alleged a breach to sustain his Declaration. Having failed to do so, by replying generally to the Plea of Conditions performed, he is in no better situation than if he had recited the condition of the Bond in the Declaration, and omitted to aver a breach. It is true, the defendant could not succeed upon a *Demurrer*, after *Oyer* and before Plea; because, until the plaintiff had the opportunity to reply, he was well in Court. It would be an extraordinary case if the plaintiff could have Judgment on a Bond, conditioned to perform the Award of Arbitrators, without any allegation, that there was an Award, or failure to perform it, in any part of the pleadings. I am therefore of opinion, the Judgment must be arrested.

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On the 2nd question, which has occurred to the Court, to wit, whether a Repleader can be awarded, I am of opinion that this case does not come within the Rule laid down in *Smith v. Walker's ex'ors.*, and other cases of the same import in this Court. In that case the Court refused to award a Repleader, because the plaintiff had not shewed a good action in his Declaration, and there was no good foundation to erect new pleadings on: but in this case, the Declaration was good until the *Oyer* of the defendant made the Condition of the Bond a part of it; and, as before remarked, he could not have demurred to it. The fault then is in the plaintiff's Replication, and not in the Declaration; so that here is a good foundation to erect new pleadings.

On this ground, I am of opinion that a Repleader ought to be awarded.

Judge ROANE. I am not entirely satisfied that a Repleader ought to be awarded in this case; because it does not appear from the Declaration, (as amended by the *Oyer*) or from the Replication, that any Award exists, or has been broken. It is not known to the Court, that the Appellee has any cause of action: and, therefore, I am not certain that we ought, by awarding a Repleader, to detain the Appellant in Court. On this point I have not formed a *conclusive* opinion: but, as the



other Judges are clear that a Repleader should be awarded, one is to be awarded accordingly.

Judgment reversed; the pleadings, and other proceedings, subsequent to the Plea, set aside; and a Repleader awarded.

Decided Nov.  
27th 1816.

### Chalmers, Jones & Co. against M'Murdo.

1. On a Bill exhibited by the holder of a Promissory Note against the maker and all the endorsers; to avoid circuity of action, the Court of Equity may fix the debt on the person first responsible. \* See Rev. Code, 2d vol. ch. 108. sect. 3. p. 135. 136.

THE Appellee exhibited his Bill on the 29th May 1811, in the Supreme Court of Chancery for the Richmond District, against the Appellants, with *Chepmel, La Serre & Co. John Bell, surviving partner of John and William Bell, and Conway and Fortescue Whittle*, defendants; setting forth, that the defendants, *Conway and Fortescue Whittle*, in payment of a Debt due to the plaintiff, endorsed to him two notes negotiable at the Office of Discount and Deposit of the Bank of Virginia at Petersburg, one for \$1500, the other for \$1063.55, executed by the defendants *Chepmel, La Serre & Co.*, and endorsed by *John and William Bell, and Chalmers, Jones & Co.*; that,

2. The first endorser of a Note in point of time, is not, of course, first responsible.

"on receipt of them, without notice of any equitable circumstances which any of the said parties, *except the said John and William Bell*, might have against any others," the plaintiff applied for payment, first at the Counting House of *Chepmel, La Serre & Co.*, (the makers of the Notes,) but found that

3. If the payee of a note write his name over that of a person who endorsed it in blank, but refused to do so except upon the ground of the responsibility of the payee as first endorser; he thereby makes himself responsible, as such, in point of contract, though second in point of time.

they had failed and left the country; next to *John and William Bell*, but they replied that *Chalmers, Jones & Co.*, exclusively, ought to pay the said Notes, because they averred that the same were executed by *Chepmel, La Serre & Co.* as a payment from them to *Conway and Fortescue Whittle*, to whom they were indebted, and that, immediately after being so executed, they were endorsed by *Chalmers, Jones & Co.*, and, with the endorsement of the latter on them, (and the said *John and Wm. Bell* had previously, *on behalf of the said Whittles*, insisted on a good endorser,) they were delivered to the said *John and Wm.*

4. An Agent endorsing a Note for the benefit of his principal, who assures him that he shall not be held responsible, ought not to be compelled to pay the money at the suit of a person, to whom the Note is endorsed, with notice of such equity; but the Decree should be against the principal. And, it seems, if the endorsee had no such notice, yet, if the principal be solvent, the Decree ought still to be against him in the first place.

*Bell*, who, having long acted as the friends of the said *Conway and Fortescue Whittle* in Petersburg, and having the highest opinion of their credit and punctuality, as well as of their honor, did not except to the circumstance of the said Notes being made payable to themselves, but, indiscreetly, as they alleged, endorsed their names above those of *Chalmers, Jones and Co.*, and remitted the said Notes to the said *Whittles*, on their positive promise that they would never consider the said *John and William Bell*, liable in consequence of such endorsement. Lastly, the plaintiffs applied to *Chalmers, Jones and Co.* who did not admit the statement of *John and William Bell* to be correct.

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On the ground that *Chepmel, La Serre & Co.* might be sued in equity as absent defendants, and to avoid circuitry of action, the plaintiff prayed the Court to fix the debt on the person in truth first responsible for it.

The Bill was regularly taken for confessed as to the defendants *Chepmel, La Serre & Co.* and *Conway and Fortescue Whittle*.

The defendant *Bell* answered, that *John and Wm. Bell*, being requested by *Conway and Fortescue Whittle* to collect a Debt due them from *Chepmel, La Serre & Co.*, applied to the latter for the same; when it was agreed that the said debtors should give their negotiable notes, with one or more approved endorsers; and, accordingly, the next day, they sent the two Notes in question, with the endorsement of *Chalmers, Jones and Co.* thereupon, but made payable to *John and Wm. Bell*; that this defendant disapproved of their being made so payable, and sent them back, to be executed anew, and made payable to *Chalmers, Jones & Co.*, by whom they might then be endorsed; but *Chepmel, La Serre & Co.* returned them afterwards to this defendant, assuring him "that they must be taken as they were, or that none could be obtained, for they could not procure any others, nor these in any other form." that this defendant then received the Notes, and wrote the name of "John and Wm. Bell" over that of "Chalmers, Jones and Co." in order to make them negotiable, without consideration, and purely to oblige *Conway and Fortescue Whittle*; of which the said *Whittles*, being apprised, assured him that *John and*

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*Chalmers, Jones & Co.* also answered, and admitted that they were in point of time the *first* endorsers, but insisted that, in point of contract, and in the very nature of the transaction, *John and William Bell*, the payees, were obliged to be the *first* endorsers, and themselves only *second* endorsers; and, but for their knowing that *John and William Bell* must endorse before them, they would not have endorsed at all.

The Notes were the only exhibits, and no depositions were taken in the cause.

Chancellor TAYLOR, "being of opinion that, in a Court of Equity, a remote endorser of a Promissory Note may be made liable, in the first instance, under proper circumstances, to the claim of the holder, so as to avoid that circuitry of action, which such holder, according to the forms of the Common Law, would be compelled to undergo by prosecuting the drawers and endorsers thereof according to their priority and succession; and being farther of opinion, from the facts disclosed by the defendants, *Bell*, and *Chalmers, Jones and Co.* in the present case, that the latter, though apparently remote endorsers on the Notes in the Bill mentioned, did in fact endorse the same before the former, and as securities to the same," therefore decreed, that the said defendants *Chalmers, Jones & Co.* pay to the plaintiffs the amount of the said Notes, with interest and costs.

From which Decree they appealed.

*Leigh* for the Appellants admitted that the Court of Equity had jurisdiction in this case; but contended that, from the nature of the contract, the payees, *John and William Bell*, were necessarily the *first* endorsers; and that, without a special contract, that the Appellants would be responsible as *first* endorsers, (which is not pretended) they could only be held responsible as *second* endorsers.

*Call* for the Appellee. *Chalmers, Jones & Co.* were *first* endorsers in fact. They state themselves that their names were first written. A man who does so subjects himself to any sa-

prescription the holder of the Bill may write. (a) Their answer shews that they agreed to endorse without any intervention of *Bell*, who knew nothing of the terms between them and the makers of the Notes. The nature of the transaction proves, and, in effect, they confess, that they undertook as *Sureties*; because *Bell* negotiated for surety from *Chepmel, La Serre & Co.*; and, as the *Whittles* did not distrust *Bell*, there was no motive for the endorsement by *Chalmers, Jones & Co.*, unless they endorsed, as sureties to the Notes.

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(a) *Russell v. Langstaff*,  
*Doug.* 514;  
*Chitty on Bills*,  
97; *Collis and others v. Emmet*,  
1 H. Bl. 313—  
322; 6 East.  
21, 22.  
(b) *Bishop v. Haywood*, 4  
Term. Rep. 470.

Mr. *Bell* is at liberty to shew that, though apparently the second, they were in fact the first endorsers. (b) For it would be a direct fraud on the world for them to write their name in blank on the Bill, with an intention not to be responsible primarily. How did they know that *Bell* would superscribe his name? It is evident that they trusted to those desperate men, *Chepmel, La Serre & Co.*, and must take the consequence.

If *Bell* had kept the Notes, he might have charged the endorsers: and, since he acted as *Agent*, and his own endorsement was formal only, it makes no difference: for *Whittle*, or his assignee, has the same right.

*Leigh* in reply. Mr. *Call* says that the person, who appears to be the second endorser, may be proved to have been in fact the first in point of time. I contend that the first endorser in point of time is not of course the first in point of contract. It is a question, which to me does not bear argument.

November 27th, 1816, Judge BROOKE pronounced the Court's opinion:

The Court, admitting that a second endorser may, by agreement, become a first endorser in point of contract, which seems to have been relied on by the Chancellor, is of opinion that the Appellants *Chalmers, Jones and Co.* do not appear to have placed themselves in that situation. On the contrary, it is admitted by *John Bell* the surviving partner of *John and William Bell*, in his answer, that they were apprized, by *Chepmel, La Serre and Co.*, that the Appellants refused to endorse the notes in question, unless there was some previous responsible endorser; which admission accords with the answer of the Appellants, in which they allege that they refused to endorse, unless

NOVEMBER, 1816. *the Bells*, who were the Payees, were the first endorsers. Nor does it appear that the *Appellants* had notice that the *Bells* were only the agents of *Conway and Fortescue Whittle* in that transaction, as is alleged in the answer of *John Bell*. In this aspect of the case, the Court is of opinion that no Decree ought to have been made either against the *Appellants*, or *John Bell* the surviving partner of *John and William Bell*; because the Equity of the latter, until disproved in a controversy with *Conway and Fortescue Whittle*, would follow their endorsement, and affect the claim of the *Appellee*; of which Equity, if it were material, *he* admits in his Bill he had notice.

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The Decree of the Chancellor is therefore reversed; and this Court proceeding, &c., it is Decreed and Ordered that *Chepmel, La Serre and Co.* pay to the *Appellee* the sum of \$1500, the amount of the first note, with interest thereon from the 23d day of October, 1810, until paid, and the farther sum of \$1063,55, the amount of the second note, with interest thereon from the 30th day of October, 1810, until paid; and, it appearing to the Court that *Chepmel, La Serre and Co.* have removed from this Commonwealth to parts unknown, the Court is of opinion, that the *Appellee* is entitled to a Decree against *Conway, and Fortescue Whittle* his immediate endorsers. It is therefore farther Decreed and Ordered that *Conway, and Fortescue Whittle*, as to whom the Bill of the *Appellee* is taken for confessed, pay to the *Appellee* the sum of \$1500, being the amount of the first note, with interest thereon from the 23d day of October, 1810, until paid, and the farther sum of \$1063,55, with interest thereon from the 30th day of October, 1810, until paid, being the amount of the second note, and costs. But this Decree is to be without prejudice to the claim of the said *Conway, and Fortescue Whittle* against *Chepmel, La Serre and Co.*

Williamson against Gordon's Executors.

Decided, Nov.  
23th, 1816.

ON the 20th day of October, 1807, *Alexander St. Clair* of the town of Staunton executed a Deed to a certain *Samuel Clarke*, conveying a House and part of a Lot, "then in the possession of Doctor *William Bays*," in the said town, in trust to secure the payment of certain sums of money, therein specified, to *Samuel Moore* surviving partner of *Robert Moore and Son*, and to *Thornburgh and Miller* of Baltimore; which Deed was duly recorded, in April, 1808.

The said *St. Clair* being indebted to *Thomas Gordon* in a large sum of money by Bond, on which a suit was pending in Augusta County Court, a written agreement under seal was entered into on the 15th of February, 1808, between him and the Attorney for *Gordon*, that he should confess Judgment on the Bond at the ensuing Term; that Execution was not to issue, (except for the purpose of keeping it alive,) for the space of two years; that he should transfer a certain Bond in part payment of the Judgment; that the balance should be paid, in equal moieties, on the 1st day of July, 1810, and on the 1st day of July, 1811, respectively; and that he should secure the payment thereof by a Deed of Trust to be executed, to the said Attorney as Trustee, upon a certain tract of Land in the County of Augusta, and on his "house and lot in Staunton in which Dr. Bays lives." After this agreement was executed, *St. Clair* confessed the Judgment, and transferred the Bond, mentioned in the agreement, but failed to execute the Deed of Trust, according thereto.

On the 29th of October, 1808, *George Williamson* having purchased of the said *St. Clair*, with the assent of *Samuel Clarke* the Trustee aforesaid, the property mentioned in the Deed of Trust of October 20th, 1807, and also another house, and a piece of ground adjoining, without notice of the agreement between *St. Clair* and *Gordon*; the said *St. Clair* conveyed the same to the said *Williamson*, by Deed of bargain and sale, which, however, was not recorded until the 15th of November, 1813; but possession was, according thereto, delivered to *Wil-*

1. A purchaser of Land, incurred by a Deed of Trust (duly recorded,) for securing a debt, having bought of the debtor with consent of the Trustee, and paid the purchase money, by discharging the debt secured by the Deed, and by paying other sums of money; having also a Deed of bargain and sale from the debtor, (though not recorded within the time prescribed by law,) and being put in possession of the land; he was adjudged to have the preferable right to call for the legal estate outstanding in the Trustee, and to be protected against the claim of a creditor suing in equity upon an agreement on the part of the debtor, (bearing date before the purchase, but subsequent to the Deed of Trust,) to secure him by a Deed of Trust on the same land; of which agreement the purchaser had no notice, when he made the contract and paid his money.

2. Of two equitable incumbrancers, he that hath the preferable right to call for the legal estate, is entitled to preference; though he hath not actually got it in, nor got an assignment, nor even possession of the deed conveying the outstanding legal title; and though his lien is of subsequent date to the other incumbrance.

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*Williamson*, who thereupon undertook to pay the aforesaid debts to *Samuel Moore* and to *Thornburgh* and *Miller*; and also another debt, on behalf of the said *St. Clair*, to a certain *John Comegys*; but *Clarke*, the Trustee, never made any release or conveyance to *Williamson*. To secure the payment of the debt to *Comegys*, another Deed conveying the same property to *Andrew Barry*, *Joseph Coman* and *Samuel Clarke*, in trust for that purpose, was executed by *Williamson*, as owner thereof, on the said 29th day of October, 1808; which last mentioned Deed was recorded on the 26th day of December, 1808.

In conformity with his contract, *Williamson* paid off and fully satisfied the purchase money for the said property, by paying the debts aforesaid to *Samuel Moore*, *Thornburgh* and *Miller*, and *John Comegys* before he had any notice of *Gordon's* claim.

On the 2d of April, 1810, a suit was brought by *Gordon*, in the Superior Court of Chancery for the Staunton District, against *St. Clair*, (without making *Williamson* a party) upon the agreement of February 15th, 1808; in which suit a Decree was made, directing a sale of the property mentioned in the said agreement to satisfy the claim of the plaintiff.

The Commissioner, appointed to carry that Decree into effect, having advertised the property for sale, a Bill was exhibited in the same Court by *George Williamson* against *Alexander St. Clair*, and *Gordon's* Executors; (he being dead;) praying an Injunction to prevent the intended sale, and a Decree quieting the complainant in his possession; or if that could not be done, that the money, advanced by him for the purchase, with interest thereon from the time when paid, together with certain other monies advanced by him to the said *St. Clair*, with interest, might be first reimbursed out of the sale of the said property; and for general relief.

Upon the Bill, Answers, Exhibits, and Examinations of Witnesses, the foregoing appeared, in substance, to be the state of the case.

Chancellor Brown, (having granted the Injunction prayed for,) afterwards, on the hearing, pronounced the following opinion and Decree.

"The Court is of opinion that the agreement, entered into on the 15th day of February, 1808, between the defendant *St.*

“ *Clair* and the agent of *Gordon’s Executors* created a specific  
 “ *lien* in equity on the property in controversy; that is to say,  
 “ on the House and Lot in Staunton, on which *Dr. Bays* lives;  
 “ and that the transaction between the plaintiff and the de-  
 “ fendant *St. Clair*, with the assent of the Trustee *Samuel*  
 “ *Clarke*, gives the said plaintiff only an *equitable* claim upon  
 “ the said property, in as much as the legal title thereto is yet  
 “ outstanding in the said *Samuel Clarke*. Both the parties be-  
 “ fore this Court being then equitable and *bona fide* claimants,  
 “ this Court considers them entitled to satisfaction, according  
 “ to the *priority* of their claims. So far as the plaintiff has dis-  
 “ charged the debts due to *Thornburgh* and *Miller*, and to  
 “ *Moore and Son*, this Court will place him in their shoes. As  
 “ to the claim therefor, he has priority to *Gordon’s Executors*,  
 “ because this *lien* is anterior to *Gordon’s*; the Deed of Trust  
 “ creating it bearing date October, 1807: but the Court will  
 “ not suffer him to *tack*, to this claim, the claim for money paid  
 “ to *Comegys*; much less will this Court suffer him to *tack*  
 “ to it the other two debts, due to him from the defendant *St.*  
 “ *Clair*. The money paid to *Comegys* cannot be *tacked*, be-  
 “ cause the plaintiff has not the legal estate, and has no equity  
 “ in this claim which entitles him to take from the defendants,  
 “ *Gordon’s Executors*, the benefit of their decree for the sale of  
 “ this property. And the latter debts cannot be tacked, as  
 “ against another incumbrance upon the property, they not  
 “ having been contracted upon the credit of this fund. The  
 “ equity, then, which stands next in point of priority to that  
 “ under the Deed of Trust in favour of *Thornburgh and Miller*,  
 “ and *Moore and Son*, is the equity of *Gordon’s Executors*.  
 “ Then follows the plaintiff’s equity under the purchase from  
 “ the defendant *St. Clair*, and the consequent payment of the  
 “ money to *Comegys*. If the plaintiff claims, as a *purchaser*,  
 “ not as an *incumbrancer*, then, *though he was purchaser with-*  
 “ *out notice*, at the time of his contract and the payment of his  
 “ money, yet he is not purchaser of the *legal title*; and this  
 “ Court will not aid a purchaser in taking away a prior equita-  
 “ ble incumbrance fairly, attached to the specific subject.”

“ But the Court thinks it would be proper, under the circum-  
 “ stances of this case, to direct a sale of the two slaves men-  
 “ tioned in the Deed of Trust, exhibited with the answer of

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" the defendants, *Gordon's Executors*, and an appropriation of  
" the proceeds thereof towards the satisfaction of the debt due  
" said Executors."<sup>(1)</sup>

" It is therefore decreed that the Injunction be dissolved,  
" (but without damages,) so far as to permit the Commissioner  
" appointed in the cause of *Gordon's Executors* against *St. Clair*  
" and others to proceed to sell the House and Lot in Staunton on  
" which *Dr. Bays* lives. But the said Commissioner is hereby  
" directed, in the first place, to sell the two slaves aforesaid in  
" the manner directed by said Deed of Trust, and to apply the  
" nett proceeds of said sale to the credit of the Decree in fa-  
" vour of *Gordon's Executors*; and, out of the proceeds of the  
" sale of the House and Lot, the said Commissioner shall pay  
" over to the plaintiff the amount of the money, paid by him  
" to *Samuel Clarke* for *Thornburgh and Miller*, and *Moore and*  
" *Son*; that is to say, the sum of \$735.65, with interest thereon  
" from the 1st of January, 1809, 'till paid; that, out of said  
" proceeds, he then discharge the residue of the debt to the  
" defendants *Gordon's Executors*; and, if any balance be left,  
" that he pay over the same to the plaintiff."

From this Decree the plaintiff appealed.

*Wickham for the Appellant.* It is clear, that the legal estate is outstanding in the Trustee, *Clarke*; that both *Williamson* and *Gordon's Executors* are equitable incumbrancers; and the question is, whether *Williamson* has a *preferable right to call for the legal estate*? For if he have such right, it is the same as if he had the estate, and he may protect himself thereby: if he have not, then the incumbrances must be paid according to priority of dates: the maxim being, *qui prior est tempore potior est jure*. (a) I admit that, if there be several liens, merely equitable, they attach according to priority of dates: but, if a subsequent equitable incumbrancer get in the legal estate, he may protect himself thereby against a prior equitable incumbrancer. (b)

(a) *Powell on*  
*Mortg.* 473.

(b) *Ibid.* 479.

(1) Note. The defendants stated in their answer, that when the real property was advertised to be sold, under the Decree in their favour against *St. Clair* and others, the sale was at first postponed, on consideration that the said *St. Clair* would give an additional incumbrance on two negroes; which was done.

I admit, too, the general rule, that if a *paisne* incumbrancer buy in a prior mortgage, the legal estate being in a Trustee or any third person; the buying in such prior mortgage will not avail; but, where the legal estate is standing out, the incumbrances must be paid according to priority. (a) To this rule, however, there is an exception; that if any one of the parties have more equity to call for the legal estate, he shall be preferred. (b)

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(a) *Brace v. The Duchess of Morbrough*, 2 P. Wms. 485.

(b) *Powell on Mortg.* 477; *Wilker v. Bodington*, 2 Vern. 589; *Willoughby v. Willoughby*, 1 Term Rep. 763. 768. 773-4.

In this case, *Williamson* being a *bona fide* purchaser, without notice of *Gordon's* incumbrance, and having paid off the previous incumbrance of the Deed of Trust, with the Trustee's consent, has the preferable right to call for a conveyance of the legal estate from the Trustee; and therefore ought to be protected against *Gordon*, whose equitable lien was subsequent to the Deed of Trust, though prior in date to the purchase by *Williamson*.

*Leigh contra.* It was not enough for *Williamson* to pay off the Deed of Trust, with the Trustee's consent. To entitle him to protection against the claim of *Gordon*, he should have got in the legal estate by obtaining a *Deed from the Trustee*; or, at least, the Deed of Trust should have been assigned, or delivered to him. In *Maundrell v. Maundrell*, 10 Vesey, jr. 271, in which case that of *Willoughby v. Willoughby*, and other cases on this subject are reviewed, the doctrine is laid down, that "a subsequent incumbrancer cannot protect himself, by a satisfied Term, against a prior incumbrance, unless such Term be in some sense got in; either by an assignment, or making the Trustee a party to the instrument, or taking possession of the Deed creating the Term;" neither of which precautions was taken in this case. In *Willoughby v. Willoughby* the point decided was not, as Mr. *Wickham* supposes, but only, that if the subsequent purchaser, without notice of the prior purchase or incumbrance, have the first and best right to call for the legal estate, then, if he gets an assignment of it, a Court of Equity will not deprive him of his advantage. So, in *Wilker v. Bodington*, the case was, that with the privity of the Trustees, one of the *cestuys que trusts*, by a Deed, reciting the Trust Settlement, assigned all his estate, right and title therein to the purchasers.

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The present case, therefore, is not like either of those cases, but rather resembles so much of the case of *Shepherd v. Tuley*, 2 Atk. 348. 354, as related to Sir Thomas Peyton, whose situation the Court held, was not distinguishable from that of any other *paisne* incumbrancer; although he had purchased from the mortgagor, and the first mortgagee had agreed (a second mortgage, of which Peyton the subsequent purchaser had no notice, having intervened) that he would convey to him the property so purchased, when his mortgage should be satisfied, but his mortgage not being satisfied, had not made the conveyance.

*Wickham in reply.* If Mr. Leigh's understanding of the doctrine, that the incumbrancer, who has the preferable right to call for the legal estate, may avail himself of that right, demand a conveyance of the legal estate, and protect himself under it, be correct, the rule amounts in effect to nothing.

November 28th, 1816. Judge ROANE pronounced the Court's opinion, "that the Decree is erroneous in this, that, as the Appellant had the *preferable right to call for the legal estate of* the premises in question, outstanding in the Trustee Clarke, he ought to have been protected against the claim of Gordon's Executors in the proceedings mentioned."

Decree reversed, with costs; and this Court proceeding, &c., it was farther decreed and ordered, "that the Injunction awarded the Appellant be made perpetual, and that he be quieted in the possession of the houses and lots in the Bill and proceedings mentioned, and recover his costs in the Court of Chancery. But this Decree is to be without prejudice to any suit, which the said Gordon's Executors may be advised to bring, to subject the stone house lot, also in the proceedings mentioned, to satisfy their judgment."

Greenhow, principal agent of the Mutual Assurance Society against Buck. Decided, Nov. 30th, 1816.

A MOTION was made in the Superior Court of Frederick County, in behalf of *Samuel Greenhow*, principal Agent of the "Mutual Assurance Society against Fire on Buildings of the State of Virginia," at October Term, 1812, against *Thomas Buck*, for the sum of \$105,60 cents, (being the amount of his two thirds quota due to the said Society, per his declaration, No. 137., filed in the General Office of Assurance,) with interest on the same from the 10th of December, 1806, until payment, with costs, damages and expenses, according to law, and the rules and regulations of the said Society; also, for the farther sum of \$8,80 cents, (being the amount of his two thirds of a quota due to the said Society, per his declaration, No. 143, filed in the General Office of Assurance,) with interest on the same from the same day, until payment, with costs, damages and expenses as aforesaid.

1: The President and Directors of the Mutual Assurance Society against Fire on Buildings of the State of Virginia are empowered, in calling for quotas to supply a deficiency in its funds, to discriminate between the members, so as to make the requisition from those only, who were insured at the time when the deficiency occurred.

The defendant filed two special pleas, in the following words:

"The said defendant by his attorney, defends the motion aforesaid, and saith that the said plaintiffs their motion against him ought not to have and maintain, because he saith; as to the quotas in the notice aforesaid mentioned, that, by the laws, constitutions, rules and regulations of the said Society, it is among other things provided, that every loss, which had happened before the 29th of January, 1805, should be paid for out of the funds belonging to the said Society on the said day, without discrimination between the towns and the country, and that such quota, or quotas, as might be necessary to repair any such loss, should be required in the same manner, and on the same principles, as the same might on the said 29th of January, 1805, have been required, without a discrimination between the towns and the country." And the said defendant farther saith, that the said quotas in the said notice mentioned, were required to repair a loss, or losses, which had happened previous to the said 29th of January, 1805. And he farther in fact saith, that the said quotas in the said notice mentioned, were not called for by a requisition, which did require quotas without discrimination between the towns and country, but which required a payment of

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“quotas by the subscribers in the country alone, and this he is ready to verify, &c.”

“And the said defendant, by his attorney, for farther plea saith; that the said plaintiffs their motion aforesaid against him ought not to have and maintain, because he saith, as to the quotas in the motion aforesaid mentioned, that, by the laws, constitution, regulations and rules of the said Society, it is, among other things, in substance provided, that, ‘in case the funds of the Society should at any time require the President and Directors to require from the insured the payment of a quota or quotas, such quota or quotas should be required of *all* the persons insured; Provided always, that no person should be compelled to pay any quota towards repairing a loss or losses which may have happened before the date of his insurance:’ and the said defendant in fact saith, that the said quotas in the said notice mentioned, were not required to repair any loss or losses, which happened before the 24th day of February, 1804: and he farther in fact saith, that the same were called for by a requisition, which required a payment of quotas from members of the said Society, who were insured in the Country Insurance previous to the 24th of February, 1804; and that no quota or part of a quota was required from any Country Insurers, who were insured subsequently thereto: and he farther saith, that divers persons residents of the country, and members of the Country Insurance became and were insured subsequent to the said 24th of February, 1804, and before the requisition of the said quotas. And this he is ready to verify, &c.”

To these pleas, the plaintiff filed the following special Replications:

“And the said plaintiffs, by their attorney, say, that they by any thing by the said *Thomas Buck* in his first plea above in pleading alleged ought not to be precluded from having and maintaining their motion aforesaid thereof against him, because they say, that the quotas, in the said notice and plea mentioned, were not required to repair a loss or losses, which had happened previous to the said 29th day of January, 1805, as in the said plea is alleged; but were required in pursuance of the first section of the 7th article of the Rules and Regulations of the said Society adopted by the President and Di-

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“rectors of the said Society, in obedience to the Act, entitled,  
“ ‘an Act for carrying into execution the Constitution of the  
“ Mutual Assurance Society against Fire on Buildings of the  
“ State of Virginia, lately adopted at a general meeting,’ pass-  
“ ed the 29th day of January, 1805 ; which said Rules and  
“ Regulations, among other things provide, in the said 1st sec-  
“ tion of the said 7th article, that, whenever the funds of the  
“ Society shall be reduced below one per cent. on the sum total  
“ insured in the towns, or in the country, as may be, the Pre-  
“ sident and Directors may require from the insured the pay-  
“ ment of a quota, or quotas, to any amount not exceeding the  
“ premium or premiums which shall have been paid by the per-  
“ sons so insured.” “ And the said plaintiffs farther say, that the  
“ President and Directors of the said Society made provision  
“ for all debts, and contracts, and obligations, due from or bind-  
“ ing on the said Society, at the commencement of the above  
“ recited Act, to wit, on the 31st day of January, 1805, out  
“ of the funds then in their hands, belonging to the said Soci-  
“ ety, before the division of the funds between the towns and  
“ country ; agreeably to their duty under the laws, constitu-  
“ tion, rules and regulations of the said Society then in force :  
“ that they divided the remaining funds between the towns and  
“ country agreeably to the said laws, constitution, rules and re-  
“ gulations ; and, afterwards, to wit, on the 31st day of July,  
“ 1806, at a meeting of the Board of Directors of the said Society,  
“ held at the General Office in Richmond, the state of the  
“ funds of the Society, belonging to the country, was under  
“ one per cent. on the sum total insured in the country ; where-  
“ fore the said President and Directors, at their meeting afore-  
“ said, on the said 31st day of July, 1806, did, in pursuance of  
“ the said 1st section of the 7th article of the said rules and  
“ regulations, require from the insured in the country a quota  
“ equal to two thirds of the premium or premiums originally  
“ paid by them, as by an authenticated copy of the proceedings  
“ of the said Board of Directors on the said 31st day of July,  
“ 1806, now here shewn, to the Court appears : and the said  
“ *Thomas Buck* being, on the said 31st day of July, 1806, and pre-  
“ vious to the 24th day of February, 1804, and during all the  
“ time between the said 24th day of February, 1804, and the  
“ said 31st day of July, 1806, a member of the said Society,

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"and having insured a dwelling-house in Frederick County, prior to the said 24th of February, 1804, barn and two mills, (as per his declaration, No. 137, in the said notice mentioned, filed in the General Office of the said Society, a copy of which declaration, legally authenticated, is now here shewn to the Court, bearing date on the 21st day of December, 1802.) in the country, and having also insured a store-house in the said County of Frederick, prior to the said 24th day of February, 1804, (as per his declaration, No. 143, also in the said notice mentioned, filed in the General Office of the said Society; a copy of which last mentioned declaration, legally authenticated, is now here shewn to the Court, bearing date the 21st day of December, 1802;) he, the said *Thomas Buck*, became liable, under his said declarations, and the laws, constitution, rules and regulations of the said Society, and the requisition aforesaid, to pay the sums mentioned in the said notice, that is to say, &c., (as per account now here shewn to the Court appears.) *not to pay for a loss, or losses, which had happened prior to the said 29th day of January, 1805, but to meet the losses which might reasonably be expected to happen afterwards: as they lawfully might do: and this they are ready to verify, wherefore they pray Judgment, &c.*"

"And, as to the *second* plea of the said defendant, respecting the laws, &c. of the said Society having provided that, in case the funds of the Society should at any time require the President and Directors to require of the insured the payment of a quota or quotas, such quota or quotas should be required of *all* the persons insured, &c., the said plaintiffs say; that they, by any thing, in the said second plea above pleaded, alleged, ought not to be precluded from having and maintaining their motion aforesaid thereof against him, because (admitting that the said quotas in the said notice mentioned, were not required to repair any loss or losses, which happened before the 24th day of February, 1804, that the same were required from members of the said Society, who were insured in the Country Insurance previous to the 24th day of February, 1804, and that no quota or part of a quota was required from any person, or persons, who had insured subsequent thereto, and that divers persons became and were insured in the

"Country Insurance subsequent to the said 24th day of February, 1804, and before the requisition of the said quotas,) they say that, by the laws, constitution, rules and regulations of said Society, made and passed, and in force on the 29th day of January, 1805, and subsequent to that day, and before the requisition aforesaid of the said quotas in the notice aforesaid mentioned, to wit, on the 31st day of January, 1805, the funds of the said Society were divided between the towns and country, and the provision mentioned in the second plea was *repealed* by the 16th section of the Act, passed on the said 29th day of January, 1805, entitled, 'an Act for carrying into execution the Constitution of the Mutual Assurance Society against Fire on Buildings of the State of Virginia, lately adopted at a general meeting;' and the said President and Directors were, by the said Act, (now here shewn to the Court,) authorized and empowered, among other things, to form such rules and regulations for the transacting of the business of the Society, whether it be to fix the rates of hazard, the quantum of interest to be insured, the recovery of monies due to the Society, or any other matter, that they may think conducive to the interests of the said Society, 'and more especially in the calling for and enforcing quotas:' and they farther say that, in calling for the said quotas, the said President and Directors did think it conducive to the interests of the said Society to place the old and new members on an equal footing; and, to effect that object, they deemed it necessary to confine the call to those members of the Society, who had insured in the country prior to the 24th day of February, 1804, which they did, as by their proceedings on the 31st day of July, 1806, herein before referred to, more fully appears; which proceedings were reported to the general meetings of the Society, held on the 15th day of January, 1807, and the 10th of February, 1808, and approved by the said meetings, as appears by copies of the proceedings of said general meetings now here shewn to the Court, bearing date on the said 13th day of January, 1807, the 15th day of January, 1807, and 10th day of February, 1808, legally authenticated; which, under the laws, constitution, rules and regulations of the said Society, the said President and Directors, and general meetings, had a right to do, and as it was just, lawful and right they should do;

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The Defendant *rejoined* to the plaintiff's Replication to the first Plea, and the plaintiff *took issue*.

To the Replication to the *second* plea, the defendant (after praying *Oyer* of the said Act of Assembly,) demurred generally; and the plaintiff joined in Demurrer.

Whereupon, the matters of law arising on said Demurrer being argued, the Court was of opinion that the law was for the defendant, and judgment was entered that the plaintiff take nothing, &c.

From which judgment he appealed to this Court.

*Williams, Wirt and Wickham* for the Appellant.

*Leigh* for the Appellee.

The Counsel for the Appellant observed, that the plea was defective, in not setting forth the particular by-law, on which the Appellee relied.

They farther contended, that full power was given to the President and Directors to make the requisition in question, by the 10th and 20th sections of the Act of January 29th, 1805. (a) The only limitation to their powers was, that they could not transcend the bounds of natural justice. Their Resolution was also approved by the General Meeting, which removes all doubt.

(a) Rev. Code  
2d vol., Appen.  
No. VII, ch. 6.  
p. 81.

The Directors pursued precisely the course which natural justice required. Equality is the fundamental principle of the institution, declared by the original Act of 1794. sect. 2d. (b) And, by the fourth section of that Act, unlimited power of modification was given to attain this object. It was this which led to the separation of the town and country funds; the benefit and the hazard being unequal under the old arrangement. On the separation of the funds, after paying for the losses occasioned by the great fire at Norfolk, on the 24th of February 1804, (which event was the cause of the new

(b) Ibid. ch. 1.  
p. 75.

arrangement) it was found, that the funds were reduced too low to ensure payment for future losses.

How was the deficiency to be supplied? Was it by making an equal call, for quotas, on those who were members when the deficiency occurred, and those who had become members since? Or by making such a call on the former, as would bring them on a par, merely, with the new subscribers?

To shew the inequality of making the call equally on the old and the new, let us suppose the original premium to be \$100; that, by the fire at Norfolk, there were left on hand only \$33.1-3, belonging to each of the old subscribers; the subsequent subscribers had each \$100: if no call had been made, would the association have been on an equitable footing, while a partner, who had full stock in trade, should draw no more benefit from the trade, than another who had only one third? Would it not have violated the principle of equality to have permitted the members to rest *equally* insured, on an aggregate fund composed of such *unequal* contributions? In like manner, when, instead of resting on the funds in hand, the call of a quota became necessary, would the principle of equality have been regarded, if the call had been made *on all equally*, as contended for by the Appellee? Or would not the same inequality, as in resting on the old funds, have been still kept up? Suppose a full quota had been called for of \$100 from each member, then the funds would have been composed of \$200 contributed by the new subscribers, and only \$133,1-3 by the old.

Again. By the third section of the second article of the Constitution of the Society, it is provided, that no person shall be compelled to pay any quota towards repairing a loss or losses, which may have happened before the date of his insurance. Now, although it be true, that the quota in this case was not called for to pay the Norfolk losses, yet the deficiency, which made the quota necessary, was produced by that event: and, according to an equitable construction of this Statute, no after subscriber should be *affected* by any loss, which occurred before the date of his insurance. - And would not an after subscriber be injuriously affected by a previous loss, if, to make up a deficiency, arising from such loss, he should be

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*On the other side*, it was said, that the supposed defect in the plea did not exist. There is a distinct reference to a particular by-law, viz. the 7th article of the by-laws passed in consequence of the Act of January 29th, 1805. The Replication admits the by-law in question, but says it was *repealed* by that Act, which is plainly impossible!

Let it be granted, that the Society had power, under the tenth section, to amend, alter, repeal or add to all their rules and regulations. The question is, have they repealed or altered *that* by-law, by any subsequent regulation? Their Replication does not pretend, that they have done so. And, if we inspect the proceedings now in controversy, it does not purport to be a by-law or regulation; but only a resolution adopted in conformity with by-laws and regulations, supposed to be already in existence. It is a report and resolution adapted to a single case, and does not purport to be a general rule, to be applied to all similar cases. As such a Resolution, it was adopted by the President and Directors; as such, they reported it to the General Meeting; and as such, the General Meeting approved it. Under the tenth section they could make by-laws; but the calls for quotas must be conformable to such by-laws, when made, until repealed or differently modified by other by-laws. It follows, that before the requisition, which forms the ground work of the present motion, could be legally made, the by-law article 7, should have been repealed or modified, so as to authorize such a requisition: but, for any thing appearing in the Record, that has not been done.

If it be asked, where is the difference between this Resolution and a by-law? The answer is obvious; that, if the Resolution had been adopted in consequence of a by-law, previously passed, the Members would have had an opportunity to exercise their option of withdrawing, under the 13th section of the same Act.

But, if this was a by-law, the Society had no right to pass it, being directly contrary to the sixth section of the original Act of incorporation, which, not being repugnant to the Act of January 29th, 1805, is not thereby repealed. By that sixth

section it is declared, that "if the funds should not be sufficient, a repartition among the whole of the persons insured shall be made." &c. Equality, therefore, is to be pursued in a particular manner: the principle, which the Legislature has adopted must be followed, though it do not answer the end of its institution: the reasonableness or unreasonableness of the regulation is not to be considered by the Court. Suppose, before the separation between the Town and Country Insurances, a loss had occurred in a town, could the Society have subjected the Town subscribers only to pay such loss? The principle of equity required this: yet they could not have done it, because bound by the Act of Assembly to follow a different rule.

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*Argument in Reply.* Whenever the Society calls for a quota, it is a regulation that a quota shall be called. It is as much a legislative Act, as any Act can possibly be; especially when the requisition has been approved by a *General Meeting*. There is nothing, that prohibits a discrimination in the proportions to be paid by individuals. Under the general rules, as they existed at the time, the Society had a perfect latitude. But, if this be thrown out of the question (the by-laws, generally, not being inserted in the Record) the Demurrer admits the truth of the Replication, which refers to the by-laws, and denies, that they require an equal call from all the subscribers.

It is admitted, that the sixth section of the Act of 1794 is not repealed by the Act of January 29th, 1805: but that section is to be construed with reference to the time at which it was passed, and also to the fundamental principle of equality. As to the time, the Legislature was looking to the original establishment of the institution, when all the members, coming in together, were, of course, on an equal footing. It is very questionable, whether it contemplated any thing more than a deficiency in the original subscription, nothing being said of deficiencies arising from losses. But if the provision was intended prospectively, to cover cases of deficiencies arising from losses, it must be construed equitably, in relation to the principle of mutual advantage and equal responsibility. So construed, it applies only to levying the quotas on those, who were insured at the time the deficiency occurred.

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Where the words of a Statute are ambiguous, the general intent must be considered. The general intent of the Legislature, in this case, was to establish equality. Injustice must be done, if the Act is to be construed, as Mr. Leigh contends. The question then is, are the words so plain as to be capable of no other construction, than that leading to this injustice? If the words must be construed *strictly*, and *not equitably*, all new subscribers are bound to contribute for old losses; a consequence so unreasonable, that he disclaims it. Such a construction would tend to destroy the Society, by preventing persons from becoming Members.

November 30th, 1816. Judge ROANE pronounced the Court's opinion, that the Judgment be reversed; the law arising upon the defendant's Demurrer to the plaintiff's Replication being for the plaintiff. And Judgment was entered, that the plaintiff recover against the defendant the sum of \$105.60 cents, being the amount of two thirds of a quota due to the said Society per declaration No. 137, filed in the General Office of Assurance, and also the farther sum of eight dollars and eighty cents, being the amount of two-thirds of a quota due to the said Society per declaration No. 143, filed in the General Office of Assurance as aforesaid, with legal interest on both of the said sums, from the tenth day of December, 1806, to the time of payment, together with seven and a half per cent. damages on said principal and interest, and also their Costs by them in the said Superior Court of law expended.

### Kendall's Executor and Devisee against Kendall and others.

Decided Nov.  
30th, 1816.

1. The addition of a Codicil to a Will is slaves to his wife, during her life, directed such of them as, not sufficient to operate as a devise of Lands purchased by the Testator between the date of the Will and the date of the Codicil; there being no words in the Codicil indicating such to be the intention of the Testator.

2. What articles are not comprehended in a bequest of "*Stock, Plantation Utensils, and Household furniture.*" \* See *Carnagy and Wife v. Woodcock and Mockay*, 2 Munf. 234.

3. *Fattening* hogs are not comprehended in a bequest, to one of a Testator's children, of the *Stock* belonging to the place whereon he lived.

at the time of her death, should have attained the age of twenty-five years, to be considered as free. The balance he gave to his son *Moses* and his heirs, "all of whom, and their increase, to be entitled to their freedom as they should severally arrive at the age of twenty-five years."

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He then devised as follows:—"I also give to my said Wife, during her life time, *the tract of land on which I now reside, exclusive of those parts hereafter devised to my sons Charles and Moses*; and, at her death, I give and devise the said Tract of Land to my son *Moses* and his heirs. I also give to my said Wife, during her life, a Tract of Land, which I purchased of my nephew *James Kendall*, and also two thirds of the Stock, Plantation Utensils and Household Furniture, belonging to the place whereon I now reside; and, at her death, I give and devise the said Tract of Land to my son *Moses* and his heirs, together with the said Stock, Plantation Utensils and Household Furniture, likewise the remaining third part of my Stock, Plantation Utensils and Household Furniture.

The Will contained several other specific devises and bequests, but no residuary clause.

After making this Will, the Testator purchased four Tracts of Land containing 1089 acres, and two Lots, in the towns of Woodstock and Acquia; three of which Tracts adjoined each other, and one of them adjoined the Tract, on which he lived at the time of making his said Will, and until he died: the fourth tract was several miles distant from all the rest.

On the day of his death he caused a Codicil to be annexed to the said Will, in these words:—"I hereby annul and revoke those parts of the within Will, which relate to the liberation of my Negroes. I give and devise to my son *Charles*, and his heirs forever, forty acres of Land lying on St. George's run, adjoining the Tract within devised to him, to be laid off, &c. In testimony whereof, &c.

Two questions arose upon the construction of this Will: 1st, whether the Tracts of Land, purchased by the Testator between the date of the Will and the date of the Codicil, passed, by the devise above stated, to the Widow for life, and after her death to *Moses Kendall*; or whether the decess-

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ed died intestate as to those lands: and 2ndly, whether  
“two Stills and a Boiler, four stand tubs full of Cyder, a set  
“of Smith's Tools and some old Iron, a parcel of Brandy  
“Hogsheads and Casks, some Leather, a Gun and a few  
“Books, and fifty head of *fattening* Hogs,” valued, in all, at  
\$555,25, were to be considered as included in the bequest of  
“*Stock, Plantation Utensils, and Household Furniture*,” or not.

Chancellor TAYLOR was of opinion, that the Testator died  
intestate as to all the real estate, purchased after the date of  
the Will; and that the articles above mentioned were not in-  
cluded in the bequest of “*Stock, Plantation Utensils, and*  
“*Household Furniture*,” but were to be divided among the  
distributees generally; and decreed accordingly: from which  
Decree, *Moses Kendall*, the Devisee and Executor appealed.

*Stanard*, for the Appellant, contended that the annexation  
of the Codicil was a republication of the Will, and subjected it  
to the same construction, as if the Will had *then* been made;  
and since, at *that* time, three of the after purchased Tracts,  
with the original Mansion House Tract formed but one Tract,  
on which the Testator then resided, they passed by the de-  
vise of the Tract on which he resided. In support of this po-  
sition he cited *Acherley v. Vernon*, *Com. Rep.* 381, and *Bro.*  
*Parl. Cases* 107; *Gibson v. Mounfort*, alias *Rodgers*, 1 *Ves.*  
489 and *Ambl.* 93; *Heylin v. Heylin*, *Comp.* 130; and *Barnes*  
*v. Crow*, 1 *Ves. jr.* 486. If this result be not produced by  
force of the republication alone, yet the intention of the Tes-  
tator, to be inferred from the whole complexion of the Will  
and Codicil, produces that effect; and, in making this infe-  
rence, the Court may look, beyond the Will, to parol evi-  
dence of the circumstances under which the Codicil was an-  
nexed, the *then* situation of this property, and the Testator's  
conception of that situation. (a)

(a) *Fonnereau v. Poynts*, 1  
*Bro. Ch. cases*,  
472, 7 *Bal.* 342;  
*Doussé v. Dennis*,  
6 *Vesey jr.*  
385; *Pulleney v. Lord Dar-*  
*lington*, 1 *Bro.*  
*Ch. cases*, 228,  
227, *Jeacock v.*  
*Falkener*, *Ibid.*  
285.

The case of *Strathmore v. Bowes*, 7 *Term Rep.* 478, and 2  
*Bos. and Pull.* 500, may seem to be against me; but critically  
scanned, it is not so. That case was decided on the con-  
structive intention of the Testator. In this case, all the evi-  
dence, not only that, afforded by the Will and Codicil, but  
the extrinsic evidence of the situation of the property, and  
the Testator's conception of that situation, shews his inten-

tion to have been to comprise the lands in question, or, at least, two of the Tracts, (called Knight's and Hammersley's,) in this devise. (1)

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*Williams contra.* The clear and fixed rule of law is that, the *heir*, being the person, on whom the law casts the estate 'till a plain intent in favour of a certain devise in a Will, duly executed, be made to appear, *he* cannot be disinherited by implication,

It will not be controverted that, if there be two Wills, and a Codicil is afterwards made confirming either, the Will so confirmed will stand. A Testator may, by the *wording* of a Codicil, make after purchased lands pass by his Will. (a) This is always a matter depending on *intention*. But there are no indications, in the Codicil in this case, of any such intention. It is evident that, when he directed the Codicil to be written, he had not those lands in contemplation. To draw such a conclusion from this Will and Codicil would be to disinherit the heirs by a forced implication.

(a) *Coppin v. Fernyough*, 2 Bro. Ch. cases. 292.

November 30th 1816, Judge BROOKE pronounced the Court's opinion, that there is no error in the Decree, which is therefore affirmed.

(1) Note. It was proved by depositions, that two of the after purchased tracts of land [*Knight's* and *Hammersley's*] were under the same inclosure with the former Mansion House Tract, and cornered at the same point; and the same Negroes, Stock, &c. were worked, and used on them; that a third Tract, called *Bronaugh's*, adjoined the Mansion House Tract, and had been cultivated by the same hands with it, but was afterwards worked by others, under a separate Overseer, and so continued until the Testator's death. One Witness said, that these three Tracts, together with the Mansion House Tract, were considered as one Tract at the Testator's death: another, that he (the Witness) considered *Bronaugh's* Tract as a separate plantation.



Decided, Dec.  
24, 1816.

## Skipwith against Young.

1. In an action on the case for consequential damages, occasioned by the erection of a Mill, if the damages recovered be less than one hundred dollars, the defendant cannot appeal to the Court of Appeals, notwithstanding it appears from the Record, that the right to erect the Mill was drawn in question.

**THIS** was an action of Trespass on the case, in behalf of *Allen Young* against *Jane Skipwith* for consequential injury to the health of the plaintiff's family, and to his land adjoining, occasioned by the erection of a Mill and Dam, by the defendant, on Cox's Creek in the County of Mecklenburg. The damages demanded in the declaration were *twenty thousand dollars*.

It plainly appeared, from the pleadings in the cause, that the right of the defendant to erect the Mill was drawn in question. The Jury found a Verdict in favour of the plaintiff for *one penny* damages, besides his costs: and Judgment was entered accordingly; from which the defendant appealed to this Court.

*December 2d, 1816*, the Judges delivered their opinions, *seriatim*.

**Judge COALTER.** The first question which arises, and which alone has been argued in this case, is whether the Court has jurisdiction.

It is an action on the case, brought by the Appellee against the Appellant, for a nuisance in erecting a Mill Dam on her own land, whereby, as he alleges, the water is thrown back and overflows a part of his land adjoining, and the health of his family is injured.

There is a great number of pleas, setting out the right of the Appellant, by consent of the Appellee and otherwise, to erect the Dam; to all of which, except two, there are Demurrers, and judgments thereon for the Appellee; one or more of which, thus demurred to, states, that *Sir Pcyton Skipwith*, the Testator of the Appellant, and under whom she claims, was seized and possessed of the said Mill in fee, and also of the land stated to be overflowed, and died so seized. The pleas on which issues were taken were the first, which is the plea of not guilty, and the sixth, which alleges that one *Lewis Dabney* in 1748 was seized of the land, where the Mill and Dam are built, and the land alleged to be overflowed, and had then a Mill and Dam there erected, &c. and that the same has ever since been kept up, and rebuilt, &c., and that the Appellant claims under said

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Dabney, &c. There was at first a Demurrer to this plea also; but that was afterwards withdrawn by consent, and issue taken thereon: after this, by consent, this plea is withdrawn, and not guilty pleaded, with leave on both sides to give in evidence the special matter in support or avoidance of the matter contained in said plea. On this there was a verdict for the plaintiff, and one penny damages, subject to the opinion of the Court on a point reserved; to wit, whether, after the Act of 1748, any person could lawfully build a Mill, although he might be owner of the land on both sides of the stream, and also of the land overflowed, without permission first obtained from the County Court; and whether, if such Mill was built before 1748, and was by accident destroyed, &c. and not rebuilt within three years, the party could rebuild without such leave, he not being within any of the disabilities stated in the statute during such three years, although he should be owner of the land as aforesaid. This question was adjourned by the Judge, who tried the cause to the General Court for novelty and difficulty; which Court directed it to be certified, that Judgment ought to be given for the Appellee. From all this it seems that the great question between the parties was the right and title to the land, alleged to be overflowed, and the right of the Appellant to continue the Mill and Dam.

This right, as it regards the Mill, it is contended is neither a Freehold nor a Franchise; and if it is either, yet it was not *the matter in controversy*, within the meaning of the second section of the Act constituting the Court of Appeals, although that right may be decided on in a manner, which, either by way of *bar* or *estoppel*, is finally conclusive between the parties: and it is farther contended that there are no points of difference between this and the cases of *Hutchinson v. Kellam* and *Lymbrie v. Seldon*, 3 *Munf.* 202, of sufficient consequence to take this case out of the influence of those.

The right to a Mill, as such, and to take toll thereat, which is descendible, and of which a widow may be endowed, is a Franchise, or a right of Toll, I apprehend, of which an Assize will lie *de libero tenemento*, according to *Jehu Webb's* case, 8 *Co.* 45-6; and if the party has a right to an abutment against, or to overflow the lands of another, it may be considered a Franchise, I presume, even within the definition thereof given

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by the Bar. A Mill permitted to be built *on these terms*, is no restraint on the right of a man to use his own land as he pleases, provided he does no injury to his neighbour; on the contrary, the property of another is, as it were, seized on, or subjected to injury, to a certain extent, it being considered in fact for the public use, (for which alone it can be taken without his consent,) such machines being considered useful and necessary to the public: this conversion of property to the public use, and of which the individual gets the benefit, is compensated for to the public by the erection of some useful machine, as a Mill, to which Toll is incident, or some other useful machine to which Toll is not incident.

The Appellant therefore claims, in this case, either a freehold right of Toll, or what may perhaps more properly be called a franchise, which, in an Assize or other real action to recover the same, would have been sufficient to give this Court jurisdiction. But if I am wrong here, the Appellee sets out a case of nuisance to *his Land*, for which an Assize, or *quod permittat prosternere*, which is called the *Writ of Right* in that case, would lie; and if such form of action had been resorted to, there is no question, I believe, but an appeal on either side would have been proper. The action on the case, though, has superseded these real actions; and it then becomes a matter of consideration, whether, if the Appellee, who was the plaintiff in this case, had laid his damages at less than \$100, and there had been a verdict against him, which on this declaration I apprehend would *finally* have concluded his rights as to the nuisance, he could have appealed to this Court; in other words, whether the damages, which may only have been for a few days continuance of the nuisance, or the enjoyment of the real estate clear of this incumbrance *was the real and main matter in controversy? the thing really claimed and sought to be recovered?* And whether the plea, which put in issue the right to the land, alleged to be overflowed, had that also been decided against him, should finally conclude him on that point without appeal? If the plaintiff, notwithstanding his claim to damages, was less than \$100, could appeal in such a case, so I apprehend might the defendant, although less damages were found against him.

But it is said, the cases of *Hutchinson v. Kellam*, and *Lymbrick v. Sheldon*, if adhered to, must govern this case, there being no substantial difference. Those cases I understand were mere possessory cases in trespass *quare clausum fregit*, in which, from the pleadings, the Verdict and Judgment would not have concluded the party, either by way of bar or estoppel, in a Writ of Right, or any other superior action, but, at most, would have been evidence in such future action.

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But if, in an action of trespass *quare clausum fregit*, the defendant should justify on the ground that the right to the freehold and inheritance was in him, and issue should be joined thereon, in which case the Verdict and Judgment would finally conclude and estop the parties as to the mere right, the question is, whether this would not differ so materially from the above cases, as to shew that the *matter in controversy* was the freehold, within a reasonable interpretation of the words of the Statute? In the case of *Outram v. Morewood*, 3 East, 346, the question was, whether the Verdict and Judgment, in an action of Trespass *quare clausum fregit*, in which the pleadings put the freehold in issue, could be pleaded as an Estoppel to another action of Trespass on the same land; and it was decided that it could; and that it was conclusive as to the right. Lord ELLENBOROUGH takes a full view of all the cases. "In *Brooke*, Title *Estoppel*, he observes, it is said to be agreed that all the records in which the freehold comes in debate shall be estopped with the land, and run with the land, so that a man may plead this," &c. "But if it be said, that by the freehold coming in debate, must be meant a question respecting the same, in a suit, in which the freehold is immediately recoverable, I answer, says he, that a recovery in any suit, upon issue joined on matter of title, is equally conclusive upon the subject matter of such Title." Speaking of this action generally, he says, Damages for an injury to the possession are the only thing demanded by the declaration; the Judgment can only give the ascertained right to these damages, and the means of obtaining them; it concludes nothing upon the ulterior right of possession, much less of property in the land, (unless a question of that kind is raised by the plea and a traverse thereon,) nor does it give possession, &c. He then goes on to cite another case, in which Lord HOLT is stated to

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have said that, in trespass, on an issue, whether such an one died seized, a Verdict was a bar to another action of Trespass, by way of estoppel, *because there issue was joined on a matter in the realty*. In a farther examination of the same case, one Judge is stated to have said, "that, in Writ of Trespass for close broken, the issue trenches well enough in the realty, as if the defendant justify his entry by reason of inheritance, which he has in the freehold, if this be traversed, this shall be peremptory. *Popham* brought trespass; the then defendant pleaded in bar, because of a lease made to him for life, and the plaintiff made title by descent of the inheritance, which was traversed, *which issue was merely in the realty*." Another Judge observes, "as my companion has said, *the issue is as high in a Writ of Trespass, if taken in the realty, as in an Assize*."

The Plea then makes a material change in the nature of the controversy; it shews that what may have been an ordinary personal action for an injury to the possession is thereby converted into a contest about the freehold. An action of assault and battery and false imprisonment, is a suit in which, *ordinarily*, we have no jurisdiction, unless the damages found are one hundred dollars: but, when the plea puts in issue the right to freedom, the consideration of damages, which cannot compensate such injury, vanishes; and we have always taken jurisdiction in such cases, without regard to the amount of damages claimed or recovered. So, too, the action of Ejectment is, not only in conclusion, but in form, for the recovery of a term for years; yet, because of the terms, on which the defendant is permitted to plead, and the use to which these actions are applied, for trying titles, as they are now moulded by the Courts, we take jurisdiction of them, and I presume would do so, even if it appeared by a special Verdict, that the Lessor of the plaintiff claimed only possession for a term of years; or if it appeared by his declaration that he was an Executor, and only sued to recover such term. So, an action on the case against a Sheriff for refusing a right to vote at an election, though an ordinary action, and sounding in damages, involves so high a privilege on the one side, and such important considerations of state on the other, that I presume this Court would not look for their jurisdiction in the damages claimed or

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recovered; for, if so, we might have jurisdiction, or not, at the election of the plaintiff to claim more or less than \$100. This case, though, seems doubly fortified. The plaintiff counts on a freehold claim to the land, said to be overflowed, and which he wishes to enjoy free from the nuisance. This freehold right in the Land is controverted, and the defendant moreover contends for her right of Franchise in the Mill. All these matters, on both sides, are claimed and put in issue by the declaration and pleadings; and unless *nominal damages* are considered of more consequence to the parties, than these *rights themselves*, I cannot perceive the distinctions, which should vary this case, in principle, from those above.

But there is another point of difference between this case and that of *Hutchinson v. Kellam*, which is perhaps not unworthy of consideration. This Court takes jurisdiction of controversies about the right to build Mills, or other Machines useful to the public, where the damages found on the writ of *ad quod damnum* do not amount to \$100. This jurisdiction is taken either under a reasonable interpretation of the words in the 2d sect. of the Act establishing this Court, to wit, "*where the matter in controversy is a freehold or franchise*," or under the 14th sect. of that Statute, which provides that "appeals, writs of error and *supersedes* may be granted to and from any final decree or judgment of the High Court of Chancery, General and District Courts, in the same manner, and on the same principles, as Appeals, Writs of Error and *Supersedes* are to be granted, heard and determined by the High Court of Chancery and District Courts to and from any final Decree or Judgment of a County Court." If Jurisdiction, in cases of Mills, is taken here by virtue of the 2d section, it also forms one of those cases which come within the sound interpretation, and not within the letter of that section; because, until the Mill is established, and more so if the application is rejected, the freehold or franchise in the Mill and Toll is not in existence, and so no real or personal action could lie concerning it. The question is, shall such freehold or franchise, under all the circumstances, be created? The right to the land, on which the Mill and Dam are to be erected, may not be in controversy any more, than the right to the land sought to be injured by overflowing; so that, according

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to the arguments of the Bar, neither the title nor the bounds of Land are drawn in question; the simple point being, whether a man shall have a right to erect, on his own Land, a Mill, or other Machine useful to the public, to the injury of another man's Land, but without depriving him of the freehold therein, on his paying *assessed damages for that injury*, to the amount, say, of fifty dollars? But if jurisdiction is taken in this case under the 14th section, it must be on the ground that, although the jurisdiction of this Court may be more limited, as to the amount of damages or sums decreed, where *they* are the criterion of Appeal, than that of the High Court of Chancery or District Courts, yet the same *great principles*, which shall allow an Appeal in the one Court, shall also allow it in the other. It is on this ground alone, I apprehend, that this Court takes jurisdiction in cases of Wills, even of personal estate, and of grants of Administration, without regard to the value of the estate; and if we have to look for our jurisdiction in these cases, and also in the cases of Tobacco Debts, Caveats, and controversies about roads, to this clause, it may also, perhaps, be proper to look to it for our jurisdiction in the cases of Mills. If we do, then, we are referred to the District Court law, sections 4th and 53d, the latter of which gives an Appeal to that Court in all suits or contests whatever, where the Debt or Damages, or other thing *recovered or claimed* shall be of the value of \$100 or 3000 lbs. of Tobacco, or where the title or bounds of Land shall be drawn in question, or the contest shall be concerning Mills, Roads, the Probate of Wills, or Certificates for obtaining Administration.

It is enough under this law that the *Title or bounds of Land is drawn in question*: which expressions, if we consider both Courts to be governed by the same *great principles*, may either be taken, in conjunction with all the laws in *pari materia* heretofore on this subject, to explain what is meant by the words, "*matter in controversy*," in the 2d section above referred to, or may be taken, in conjunction with the preceding parts, to give jurisdiction in cases not within that section. For if the contest shall be *concerning a Mill*, which is literally this case, why should we have jurisdiction in such contest before it is built, or liberty granted to build, and not in such contest after it is built, and whereby it is finally to be de-

stroyed? The latter controversy is more within the mischief; the injury to the party, by an erroneous decision, in destroying a valuable Mill already built, being greater, than in refusing permission to build.

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But it may be said that the contest here intended is that, which arises under the law, directing applications to be made for leave to build Mills. Such restriction, however, I presume would not be allowed, if that would oust the Superior Court of Law of jurisdiction had this case originated, and the same proceedings been had, in the County Court. If that Court would not have had jurisdiction under the broad expressions above, it must be deprived thereof, unless it should be given under a liberal interpretation of the words, "where the title or bounds of Land are drawn in question:" but to this latter it might be objected, that, though the freehold or franchise in the Mill and Toll are drawn in question, yet, as argued at the Bar, neither the Title nor Bounds of Land are *so drawn in question*; and this objection would equally avail, if, instead of case, the action had been an assize, or a *quod permittat*: so that, by adhering too strictly to the letter of these Statutes, without advertting to the mischief and the remedy, and without considering them all together, as constituting one grand whole, we would deny the Superior Courts of Law appellate jurisdiction from judgments of the County Courts, where the Damages would not give it, in this case, and even if an assize or *quod permittat* had been the form of action; the result of which would be that, although it is admitted this Court would have jurisdiction in this latter form of action, it would be ousted of it in all cases beginning in the County Courts, as an Appeal will not lie from them except through the Superior Courts.

If, then, an Appeal in this case from the County to the Superior Court would have been proper either on one ground or the other; and if our jurisdiction, in a variety of other cases not within the 2d section, has been taken, as coming within the same principles, which governed the District Courts, I cannot see why it ought not to be extended to this case also, if it is not within that section.

I refer to my opinion in the case of *Hutchinson v. Kellam*, and *Lymbrick v. Seldon*, to shew the time and manner, in



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which the 14th section of the law, constituting the Court of Appeals, was at first introduced, and to shew that its object and operation were to enlarge the jurisdiction of this Court to cases not within the 2d section.

I can perceive no reason why a right to the freehold shall be *finally concluded* by a hasty opinion pronounced in the progress of a trial in one form of action, without the benefit of the supervising power of this Court, when it is not in another form of action; nor do I believe the Legislature intended such a state of things to exist in this Country. Whatever, therefore, may be the law as to cases of *trespass quare clausum fregit*, where the pleadings do not put the freehold in controversy, and which therefore would decide nothing *finally* as to it, and in which, at most, the Verdict would only be evidence

(a) *Ferrari's* in another action, (a) I think there is fair ground for our  
Case 6 Co. 7;  
*Outram v. More-* jurisdiction in this case.  
*wood*, 3 *East*.  
856.

Judge CABELL. I consider this case as being the same, in principle, with those of *Hutchinson v. Kellam* and *Lymbrick v. Seldon*. It was there decided that, to give this Court jurisdiction, on the ground of the *matter in controversy* being a freehold or franchise, the freehold or franchise must be *directly the subject* of the action. This is an action claiming *damages*; and nothing else can be recovered. Although, therefore, other matters may be controverted by the parties in the pleadings, or at the trial, yet the *damages* are the only *subject* of the action; and being less than one hundred dollars, I am of opinion that the Appeal must be dismissed.

Judge BROOKE. It is not now intended to review the case of *Hutchinson v. Kellam* decided in this Court; nor is it necessary to adopt the whole course of reasoning pursued by the Judges in that case. When the words of a Statute are ambiguous, it may be proper to consider all the Statutes on the same subject, that can assist in coming at its true meaning. My own opinion is, that the 2d section of the Act, reducing into one Act the several Acts, concerning the Court of Appeals, and giving it jurisdiction, on a sound construction of which the case now under consideration depends, is not liable to that objection; and that, without the aid of the 14th section in the

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same Act, which applies to another class of cases, the words in the 2d section are susceptible of a clear and precise meaning. The general expressions in the 14th section cannot control the particular expression in the 2d section; nor can the cases, heretofore decided under the operation of those general expressions, by any inference from them affect the construction of the 2d section, which applies strictly to the case now to be decided. It is enough to say that none of those cases are analogous to the present one. The words of that Section are, "the said Court shall have jurisdiction, if the matter in controversy be equal in value, exclusive of Costs, to \$100, if the judgment sought to be reversed shall be rendered in the District Courts, or \$150, if in the General Court or High Court of Chancery, or be a freehold or franchise." If those words were not, however, as clear and precise, as is supposed, the case of *Hutchinson v. Kellam* has settled their meaning as to similar cases. The exposition given by that case is, that, if damages are claimed, and are to be the only object of the action, they are the subject in controversy; and unless the amount recovered be at least \$100, exclusive of Costs, this Court cannot take jurisdiction.

In the case now before the Court, the recovery of Damages is the only direct object of the suit, and the amount recovered by the Judgment, exclusive of Costs, is the only criterion, by which to test the jurisdiction of this Court. It is insisted, though, that this case differs from the case of *Hutchinson v. Kellam* in this, that a franchise is put in issue, and that in another action the Appellant would be estopped to insist on her legal right to erect the Dam, the erection of which is complained of in the Declaration. Whether this difference really exists, or not, it is not now material to inquire: it is not now necessary to decide whether the Certificate, or the Case referred to, that the freehold came in question, would be equal to the finding of a Jury to the same effect, and if pleaded would be an estoppel in another action; because that Case was not decided on the ground that the Judgment would not operate as an estoppel in another action, but under the force of the expressions in the 2d section of the Act before recited. The Legislature, certainly, when it became its duty to revive the laws in 1792, had the power to give or to take away ju-

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jurisdiction. In the exercise of that power it gave some jurisdiction to the County Courts, a higher jurisdiction to the General and District Courts, and a still more exalted jurisdiction to this Court, except in criminal cases; the boundaries of which are designated in the several Acts establishing the several Courts. In the 53d section of the Law establishing the District Courts, which gives to those Courts appellate jurisdiction, there is a marked difference. The expression, in that section, applicable to the present inquiry is, "or where the title or bounds of Lands shall be drawn in question." In the section of the Law constituting this Court, before cited, the expression is, "the matter in controversy," &c. It was thought unsafe to confide to the County Courts (for reasons that are very obvious) the final decision of the cases described in the section, though the damages or sum recovered amounted to only one cent; but in relation to cases decided in the General or District Courts, constituted by Judges, elected by the Legislature, there was less of error to be apprehended, and, in allotting to this Court its appellate jurisdiction, the words, "Title or bounds of lands shall come in question," are dropped, and the words, "the matter in controversy," are substituted. The matter in controversy is that for which the suit is brought, and not that which may or may not come in question. In the case relied on in 3d East, Lord Ellenborough says the Judgment is the fruit of the action, and can only follow the particular right claimed, and injury complained of. The injury in the case before the Court, I think, is emphatically the matter in controversy, though other matters may have been put in issue, the finding of which by the Jury may, if pleaded, estop the party in another action. In the case of *Long v. Lewis*, I referred to a case in *Cranch*, in which the Supreme Court of the United States, under the influence of similar expressions in the Act of Congress referred to, take jurisdiction under cover of the penalty of the Bond, which was sufficient in amount to give jurisdiction, because I presume the Condition, substantially, was the matter in controversy. That case, it is true, is no authority here, but ought to have weight, considered as the exposition of eminent Judges of the words in the section of our Act, on which I rely: nor is it material, according to my view of the case, that no other Statutes *in pari materia* were before them. If this Court

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is to take jurisdiction by consequence; that is, if an Appeal will lie here from the indirect decisions of the inferior Courts, in which matters may have come in question, though not in controversy, between the parties, according to the foregoing exposition of that expression; few cases will escape the jurisdiction of this Court. In an action of *assumpsit*, if enough is claimed in the Declaration, and the Judgment is for one cent, it may be said that the sum denied by the Judgment was large enough to give this Court jurisdiction. So, also, in Slander, Assault and Battery, &c. Yet such a pretension has never been urged here, either on the ground that the party was estopped by the Judgment, or on any other. It would be difficult to define the jurisdiction of this Court, if it is to look to consequences out of the Judgment to be revised, under the authority given by the 2d section of the Act before referred to. Whether the supposed Estoppel in the present case will ever be relied on in another action it is impossible to know: it is not now the matter in controversy in the action. I conclude, therefore, both upon the Law, and the authority of the case of *Hutchinson v. Kellam*, that this Court has no jurisdiction of the case before it, and that the Appeal must be dismissed.

Judge ROANE. I consider that this Case, on the point of jurisdiction, has been settled by the Cases of *Lymbrick v. Selden*, and *Hutchinson v. Kellam*. I therefore concur with the two last Judges that the Appeal be dismissed.

Appeal dismissed, as having been improvidently allowed.

### Stone against Pointer.

Decided, December 7th,  
1816.

STOKELY TURNER, having sued out a *fi. fa.* against *Nathaniel Jones*, put it into the hands of *Stone*, Sheriff of Halifax, who, by *Turner's* direction, levied it on three slaves; the sale of

1. Under the Act of Assembly concerning Sheriffs, (Rev. Code, 2d Vol. p. 160,) the Sheriff, having received the *bond of indemnity*, is bound to sell the property taken in execution, whether it belongs to the debtor, or not.

2. In such case, there is no implied warranty by the Sheriff of the title to the property sold, nor implied promise to refund the purchase money if the buyer be evicted.

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which being forbidden, *Stone* demanded an indemnifying bond, which was given accordingly, and returned to the Clerk's office; whereupon, the Sheriff sold the property to *Pointer*, "who bid for and bought the same, with *full knowledge* of all "the circumstances of the title of the party who afterwards "recovered them." The Sheriff immediately paid over the money to *Turner*. An action of Detinue was brought against *Pointer* for the slaves, so purchased by him; and they were recovered of him. He then brought an action of *Assumpsit* against the Sheriff, to recover of him the purchase money, and expenses incurred in defending the title.

The Declaration contained two Counts; one stating the circumstances specially, and charging a promise to pay; the other, in the usual form, for money had and received. *Plea non assumpsit*, and issue.

The Jury found a verdict for the plaintiff, subject to the Court's opinion, on a case, which presented the above facts, but did not state any promise by the defendant. The Superior Court of Law gave judgment for the plaintiff; and the defendant appealed to this Court.

*Leigh, for the Appellant*, insisted, that, where there is neither an express, nor implied promise of re-payment, an action for money paid and advanced, or had and received, does not lie; (a) and that from the facts, stated in this case, it was not possible to *imply* a contract binding the Sheriff to warrant the title, or to refund the purchase money.

(a) *Bull. N. P.*  
130; 1 *Term*  
*Rep.* 20.

*Bouldin, contra*, relied on the general proposition, that a seller of personal property warrants the title. There is no reason for making a difference in this respect, between a Sheriff's sale, and other sales. The act of *levying a fi. fa.* is a strong declaration, by the Sheriff, that the property belongs to the defendant. The policy of the country requires that the purchaser should consider the Sheriff responsible for the title. There is no *privity* between the purchaser and the creditor.

It is contended that the Sheriff is compelled to pay over the money to the creditor: but the law does not compel him to *levy* the execution on property, *not* belonging to the defendant, though shown to him as his property. The Act of As-

sembly (a) does not prevent him from putting it upon the parties to try their title, as the Court, in *Baird v. Rice*, (b) said he might. The right of the creditor to give an indemnifying bond does not compel the Sheriff to *levy* the execution. The Sheriff acts at his peril. If he be not responsible to the purchaser, he may, by a little tampering with a claimant, raise money by execution, out of property, that does not belong to the debtor.

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(a) *Rev. Code,*  
*2d Vol ch. 129,*  
*p. 160.*  
(b) *1 Call. 22.*

A more serious question in this case is, whether the purchaser's having *notice* of the existing claim shall deprive him of remedy. But in the nature of the case, there was, I contend, an express warranty by the Sheriff. The purchaser's being induced by the Sheriff to purchase, and being injured, is sufficient consideration to raise an *assumpsit*. The Sheriff, too, is indemnified; so that the creditor, who has improperly received the money, is ultimately responsible to him.

*Assumpsit* for money had and received, is the proper form of action, where the seller affirms the property to be his, and it turns out not to be so. (c)

(c) *1 Esp. N.*  
*P. 11.*

*Leigh in reply.* I do not controvert the general rule of law, that the seller is responsible for the title; but I find no instance where this rule has been applied to a public officer, who is *compelled* to sell, and compelled to pay over the money. The Sheriff, when the creditor shews him the property, and offers the bond of indemnity, is *bound* to *levy* the execution, and to sell. The bond is given to protect the Sheriff against the right of the person claiming the property, not against the suit of the purchaser to recover his money back. Besides, under the Act of Assembly, the person authorized to sue upon the bond, is not the Sheriff, but the claimant of the property. There would be greater propriety in the *purchaser's* suing the *creditor*, (to whom the money has been paid over,) than the *Sheriff*.

December 7th, 1816, Judge ROANE pronounced the following opinion of the Court.

This is an action of *Assumpsit*, brought by the Appellee against the Appellant, as Sheriff of the County of Halifax. The Declaration contains two Counts. The first states, in

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substance, that a *fi. fa.* had issued at the suit of *Turner* against *Jones*, which came to the hands of the defendant, and was by him levied on three negroes; that, afterwards, a doubt arising as to the title of the said *Jones* to the said negroes, the defendant, the Sheriff, demanded from said *Turner*, a bond of indemnity under the Act; which bond was given; and that, thereupon the said slaves were exposed to sale, and purchased by the plaintiff, for 104*l.* which the defendant then received from the plaintiff. It then states that an action of Detinue was afterwards brought by one *Samuel Pointer* for the said slaves, who recovered the same with one penny damages, whereby the plaintiff was obliged to deliver up the said negroes, and pay the damages aforesaid; by reason whereof, the Declaration avers, the defendant became liable to refund to the plaintiff, the price paid for the said negroes, and the costs and charges incurred in defending the suit aforesaid, and, being so liable, assumed to pay the same. There is another Count, for money had and received. On a trial, upon the plea of *non assumpsit*, the Jury found for the plaintiff the sum aforesaid and interest; subject to the opinion of the Court on a case, stating, in substance, that *Turner ordered* the defendant to take the said negroes in execution; that he did so; and, the sale thereof being forbidden, the defendant demanded a bond from *Turner*, which was given, the slaves sold, the money received from the plaintiff, and *paid over* to *Turner*; and that the plaintiff bought the negroes aforesaid, knowing all the circumstances of the title of the party, who afterwards recovered them.

The Superior Court adjudged the law to be in favour of the plaintiff; from which judgment the defendant appealed.

The Court is clearly of opinion that, under the true construction of the Act concerning Sheriffs, (Rev. Code, vol. 2d., p. 160.,) the Sheriff having received the bond of indemnity, was bound to sell the slaves in question. Unless he was so bound, the giving of the bond by the creditor would be a vain ceremony. He is not only so bound, but he is sheltered from any action by the party claiming the negroes, unless the obligors in the bond prove insolvent, by the express provision of the 3d section. This Act was made for the ease and relief of the Sheriff, and exonerates him from his common law liability in case of illegal seizures, and from the measures previously

necessary to be resorted to, to ascertain the property of the goods seized; we mean, in all cases in which the sale is forbidden, and the bond contemplated by the Act is given. It does not, however, injure the rights of the claimants of the property; for it interposes other and sufficient defendants, to satisfy their claims, and holds the Sheriff himself also liable, in the event of proving insolvent. This view, however, is merely in relation to the rights of the original claimants of the property. It is in exclusion of that of the present Appellee. He stands only in the shoes of a purchaser of property at a Sheriff's sale, and can only go against the Sheriff, for damages, on the ground of an express or implied warranty of the title of the negroes sold, in consequence of being evicted. The Court will not stop to inquire whether the present form of action is adapted to a recovery in favour of the Appellee, being clearly of opinion that he is not entitled to recover against the Sheriff in any form of action,

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However the question of warranty may be, in the case of sales made by Sheriffs prior to the *Act* in question, or in cases not coming within it, no warranty can be implied in the case before us. The Declaration of the Appellee, itself, makes a case under the Act, and in which the Sheriff was *bound* to sell, whether the negroes belonged to the defendant to the *fi. fa.*, or not. We cannot say, therefore, that the Sheriff impliedly warranted the title of the slaves in question. The Appellant has only done what he was bound to do; he has broken no faith with the Appellee; he has duly paid over to the creditor the money he received from the Appellee, and has, certainly, neither contracted in law, or equity, to refund it. Whatever redress the Appellee, therefore, may be entitled to, it is not against the Appellant. We are, therefore, unanimously, of opinion that the judgment is to be reversed, and entered for the Appellant.



Decided, Dec.  
10th, 1816.

# The Attorney General *against* Fenton,

AND

## The Same *against* Shepherd.

The Act of January 10th, 1815, on the subject of Writs of Habeas Corpus, does not authorize the issuing of a Writ of Error by the Court of Appeals to a Judgment discharged from custody of a person confined, by sentence of a Court Martial, for failing to pay a fine, imposed upon him, for not appearing at the place of Rendezvous, and not marching, in obedience to a requisition of Militia; for in such case, there is no discharge, by the Judgment, of a person from the service of this State or of the United States.

AMONG the minutes of a Court Martial convened by Lieut. Colonel Beatty of Frederick County, 31st Regiment Virginia Militia, under authority of "an Act to amend the Militia Laws of this Commonwealth," passed February 14th, 1814, the three following entries appear, viz.: "At a Court Martial, held at the Court-house in Winchester, on Thursday, the 10th day of November, 1814, agreeably to the adjournment of the 24th of October, by order of Lieut. Colonel Henry Beatty, for the trial of such persons, as failed to appear at the place of Rendezvous, and march, under the late requisition of July 20th, as also those, who failed to march with Captain Darlington under orders of 31st March last; Present Lieut. Colonel Henry Beatty, President; Major Joseph Sexton, Major Charles Brent, Captains Sanford, Roberts, Baldwin and Darlington. Colonel Beatty administered an oath to the members impartially to decide on all matters, that shall come before them; and Major Sexton administered the same oath to Colonel Beatty. The excuse of Josiah I. Fenton being heard and considered insufficient, it is ordered that he be fined forty-eight dollars, being six months pay. Ordered, that the persons this day fined, be imprisoned one calendar month for every five dollars of the fines imposed on them, in case they fail to pay the same, or in proportion for such part thereof, as they shall fail to pay." A certificate of these two last orders, (signed by the Clerk of the Court Martial, not by the President,) was delivered to the Sheriff of Frederick.

Fenton failed to pay the fine: the Sheriff took him in custody: he applied to the Superior Court of the County for a Habeas Corpus, which was awarded; and the Sheriff returned the above certificate as the warrant and cause of detention. The minutes of the proceedings of the Court Martial being produced in Court, the three Entries above quoted appeared.

The Superior Court pronounced the following opinion: "It seems to the Court here that it does not appear from the said

“proceedings, that any specific charge was exhibited against  
“the said *Josiah I. Fenton*, or of what, in particular, the crime,  
“for which he was fined and directed to be imprisoned as  
“aforesaid, consisted. But, so far as the Court can discern the  
“nature thereof, it would seem that, being called forth into ac-  
“tual service by some legal requisition, he was charged with  
“having failed to obey such call. By the statute of 1804, ch.  
“36, sect. 43, it is enacted that, ‘whenever any Militia shall  
“be called forth into actual service, they shall be governed by  
“the articles of war, which govern the troops of the United  
“States, and Courts Martial shall be held, as therein directed,  
“to be composed of Militia Officers only.’ ‘And although  
“the statute of 1814, ch. 4., has, for obvious reasons, directed  
“that, in the cases contemplated by it, those Courts Martial  
“shall be ordered by and composed of officers not in actual  
“service, and has designated the number and rank of the offi-  
“cers, who may compose them, it does appear to the Court  
“here, that it has not interfered farther with the prior laws  
“upon this subject, or made any other new regulations respect-  
“ing the mode of proceeding of such Courts, but has left them  
“to be governed in other respects by the laws, which were in  
“existence at the time of passing that statute, and, more par-  
“ticularly, with respect to the oath to be taken by the mem-  
“bers, when such Courts are constituted; on which subject  
“the statute of 1814 is entirely silent. And yet it appears by  
“the 28th section of the Act of 1804, that the Legislature  
“considered the oath prescribed by the Articles of War, as an  
“important part of those proceedings, and not to be departed  
“from, but by the authority of express law. And it also ap-  
“pears by the statute of 1792, ch. 57, sect. 2., that the Le-  
“gislation has expressly declared, that ‘no person shall have  
“power to act in any office, legislative, executive or judiciary,  
“without taking such of the oaths prescribed by that Act, if  
“another be not specially prescribed, as is adapted to his case.  
“And the Court also recollecting, that it is a principle of com-  
“mon law, that oaths prescribed by statutes cannot be quali-  
“fied, but must be taken in the very words of the statute; and  
“it appearing to the Court here, from an inspection of the  
“proceedings of the said Court Martial, that neither the oath  
“prescribed by the said articles, nor any oath known to or

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"prescribed by any law of this Commonwealth, was, either  
"in form or substance, administered to the members of the said  
"Court Martial; but that the oath, administered to them, was es-  
"sentially and materially variant from them, and every of them;  
"it is the opinion of the Court here, that the said Court was not  
"legally constituted, and therefore had not jurisdiction of the  
"said case, and was by the law of the land, denied all power  
"to act therein. And thereupon the said *Josiah I. Fenton* is  
"discharged from custody. And it is considered by the Court,  
"that he pay to the officers of this Court their respective fees,  
"for their services respectively rendered to him in this behalf."

To which Judgment the Court of Appeals, on motion of the  
Attorney General, awarded a Writ of Error, which was applied

(a) *Acts of 1814* for under the Act of January 10th, 1815, sect. 11. (a)  
—15, ch. 28. p. 68.

The case of *Shepherd* was similar to that of *Fenton*; except  
that it did not appear, that *Shepherd* had any notice of the ac-  
cusation against him, or of the sitting of the Court Martial;  
or that any process was issued to bring him before it; and,  
from the examination of the Clerk of the Court Martial, it ap-  
peared that the proceedings in his case were altogether *ex parte*;  
whereupon, he was discharged from custody by order of the  
Superior Court of Law.

These cases were argued together by *Nicholas* (the *Attorney General*.) in support of the Writs of Error, and by *Leigh* on the other side, on the 29th and 30th days of October, 1816: but none of the points made in this argument were determined by the Court.

*Friday, November 29th*, the Court requested a re-argument on these points

1st. Whether the defendants in error were so "in the *service* of this State," and so discharged from that service, as to authorize an application by the Attorney General for a Writ of Error, under the 11th Section of the Act of January 10th, 1815.

2d. In the event of this Court's having Jurisdiction in the case, it is farther worthy of more particular inquiry whether the term of imprisonment, which ensues the non-payment of the fine, should not be ascertained by a subsequent Court Mar-

tial, instead of being left to the officer to say whether, and how much of the fine has been paid. DECEMBER, 1816.

Upon these points, a re-argument was had in the absence of the Reporter. Attorney General  
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December 10th, 1816, Judge ROANE pronounced the Court's opinion, as follows :

The Court, (not deciding whether the Act of January 10th 1815, concerning Writs of *Habeas Corpus*, gives a right of appeal to this Court, by means of a Writ of Error to the *defendant* to such Writ of *Habeas Corpus*, as well as to the *prisoner*, in the case of a confinement like that now in question,) is of opinion, that the right of appeal, given to the Attorney General by the 11th Section of the said Act, is confined to the case of persons held in *service* of this State, or of the United States ; by which the Court understands *military service*, or at least a service different from, and of greater urgency than the *confinement* of the Appellees now in question. On this ground, the Court is of opinion that the said Act did not warrant the Writs of Error in these cases ; and they were improvidently awarded. It is therefore ordered that the same be dismissed.

### Grantland against Wight, Executor of Joy and of Prentis. Decided Dec. 11th, 1816.

AFTER the reversal, by this Court, of the decree in the case of *Grantland v. Wight*, reported in 2 *Munf.* 179—186, the cause being remanded to the Court of Chancery, with directions, that the Injunction be re-instated, until *Wight* should “tender a good and sufficient Deed in the opinion of the Chancellor” *Wight* accordingly tendered a Deed from him as Executor, with special warranty against the claim of all persons

1. A purchaser, having taken possession of the estate, is not entitled to relief in equity, against a judgment for the purchase money, on the ground, that the title of the Vendor is not

clearly shown to be good ; but is bound, on his part, to prove it bad.

2. An Executor selling the land of his Testator, by virtue of a power given by the Will, is not bound to convey with general Warranty, without an agreement to that effect ; but to that only with special Warranty, against himself and all persons claiming under him ; notwithstanding a written agreement, after the sale, that he would make “a good and indefeasible title” to the purchaser ; for such agreement is to be understood in reference to the terms of the sale.

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claiming under him, and delivered a *Copy*; but, as *Grantland* did not pay the purchase money, of course the original Deed was not delivered, but filed with the papers in the cause. To the Deed, so tendered, *Grantland* filed three Exceptions:—

1st. Alleging, that the same was not in compliance with the Decree of the Court of Appeals, “as it did not *appear*, “that the *title* to the Lot in question was thereby conveyed; “it not *appearing*, that the Testators of the said *Wight*, or either “of them, had the *legal title*, or that he was duly authorized to “convey; and no title papers are exhibited by the said *Wight*, “which can enable the said *Grantland* to ascertain how the “title was derived from the original grantee, or how long the “defendant, and those under whom he claims, were in possession previous to the sale.”

2dly. “Because the said Decree is not properly recited in “the said Deed: it being directed thereby, that the said “*Wight* should *tender* a good and sufficient Deed, and not that “he should *execute* one; the plaintiff understands the Decree, “that he should *procure* a Deed to be executed from those “having the *legal title*, if the same were not vested in him.”

3dly. Because “the Deed does not contain a clause of “warranty, binding the said *Wight personally and his heirs*, “according to *his agreement* (1) among the Exhibits, and “according to the said Decree.”

An original Deed from *Mathew Thomson*, and *Catharine* his wife, to *John Joy* and *John Prentis*, and the privy examination of the said *Catharine* annexed thereto, with a certificate, that the same was of record in the Husting's Court of the city of Richmond, and the Wills of *Joy* and *Prentis*, by which the Executor was empowered to sell the real estate of both the Testators, (2) being filed as Exhibits in the cause; and it appearing, by the plaintiff's own shewing in the supplemental bill, on which the Injunction in his favour had been granted, that he had taken possession of the premises; the Court of

(1.) Note. The agreement was, that *Wight*, on payment of the purchase money, would make to *Grantland* and his heirs, or assigns, “a good and “*indefeasible title in fee simple* to the tenement purchased as aforesaid.”

(2.) Note. The power to sell enabled the Executor to make the Conveyance also. See the Act of 1792, Rev. Code, 1st vol. ch. 92. § 45.

Chancery overruled the Exceptions to the tendered Deed, and, approving thereof, dissolved the Injunction as before ;(3) whereupon *Grantland* again appealed.

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v.  
Wight.

*Wickham*, for the Appellant.

*Leigh*, for the Appellee.

December 11th, 1816, the President pronounced the Court's opinion, that there was no error in the Decree, which therefore was affirmed.

# **Wilson and others against Graham's Executor and Devises.**

Decided Dec.  
13th, 1816.

THIS was a suit in the Superior Court of Chancery for the Richmond District, in behalf of the appellants assignees of *Nathaniel Burwell*, for an account of the assets belonging to the estate of *Elizabeth Graham* deceased, and to subject

1. A Vendor of land, by executing a Conveyance and taking bond and security for the purchase money, discharges

(3) Note. The Chancellor was of opinion, " that a *Vendee* being in possession, as in this case, and coming into equity for relief against a Judgment at law for the purchase money, on account of any defect in the title, must prove such lien ; (1) even defect, and has not the right to ask of the Vendor to deduce his title. Not so, where the Vendor is plaintiff, asking for a specific performance and the purchase money : then, he must, to enable a Court of Equity to relieve him, come with a title, agreeably to his contract, free from suspicion ; for, if there be any doubt about it, the *Vendee*, being a defendant, may, if the case requires it, have a reference of the title to a Commissioner of the Court, in order that the title may be deduced, and the defects, if any, removed, before relief should be afforded, unless in case of mere probability." He was also of opinion, " that the agreement among the exhibits should be understood in reference to the terms of the sale, as disclosed by the plaintiff in his Bill ; and, therefore, the defendant *Wight* was not bound to make a Deed with a warranty, against himself and his heirs, in any other manner than as expressed in his Deed aforesaid." \* See, in support of this opinion, *Sugden's Law of Vendors*, p. 210. 213. 214. 155. 157 ; *Colton v. Wilson*, 3 P. Wms. 191 ; and *Calcraft v. Roebuck*, 1 Vesey, jr. 225 ; authorities cited in Mr. Leigh's argument.

(1) Note. *Quære* whether the taking a bond without security has the same effect ? \* See *Cole v. Scott*, 2 Wash. 141 ; *Blackburn v. Gregson*, 1 Erc. Ch. cases, 420 ; and *Duval v. Bibb*, 4 H. and M. 113.

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visees.

tract of land (which, in her life time, was sold and conveyed by the said *Burnell* to a Trustee for the benefit of her and her children) to satisfy the claims of the Appellants, to whom the bonds taken for the purchase money were assigned. It appeared, that a certain *John Wyatt*, who was said, but not proved, to have died insolvent, was security in those bonds. Suits were brought upon them at law by the assignees: in one instance, the defendant, *Elizabeth Graham*, pleaded *coverture* at the time of executing the bond: and judgment was pronounced, that the plaintiff take nothing against her, but that he recover against *Wyatt*: in another case, judgment was obtained by the plaintiff against her only. Those Judgments were alleged to be unsatisfied; and this suit was brought to get satisfaction. The Executor of Mrs. *Graham*, by his answer, insisted, that she was a *feme covert*, and not bound by the bonds. A compromise took place between the plaintiffs, and several of the devisees, by which the latter gave up their respective shares of the land to the former, who, on their parts, relinquished any claim for profits.

On the 19th of June, 1811, a Decree *nisi* having been served upon the defendant, *Walter Graham*, and he still failing to answer the Bill, upon the motion of the plaintiffs for a Decree against him, Chancellor TAYLOR was of opinion, that, "by the terms of the Deed from *Nathaniel Burnell*, *Elizabeth Graham* and her children were all joint purchasers; and that the said *Burnell*, by executing that Deed, and taking bonds for the purchase money, discharged the land from his equitable lien; so the plaintiffs, as his assignees cannot now be allowed to claim, under him, that which he had abandoned;" and, also, "that if (as the fact seems to be) *Elizabeth Graham* executed those bonds while *covert*, they were, as to her, void, and, therefore, the plaintiffs have no right to an account of her assets, in the hands of her Executors." He, therefore, dismissed the Bill as to the said defendant, *Walter Graham*: (1) from which Decree the plaintiffs appealed.

(1) Note. The plaintiffs thereupon moved for leave to amend their Bill, and to make the representatives of *John Wyatt* parties defendants; which the Chancellor, "for reasons too obvious," refused.

After an argument by the Counsel for the Appellants, no Counsel appearing for the Appelles, the President, on the 13th of December, 1816, pronounced the Court's opinion, that there was no error in the Decree, which therefore was affirmed.

## Stovall against London.

Decided, Dec.  
14th, 1816.

ARTICLES of agreement were entered into, on the 11th of September, 1809, between *John London* and *George J. Stovall*, to the following effect : viz. ; *London* agreed to convey to *Stovall*, with general warranty, a Tract of Land "in the State of Tennessee and County of Robertson, known and distinguished by the name of *Turnbull's Horse Stump*, the same being one entire pre-emption, or 640 acres of Land, formerly belonging to *Andrew Hart*, and which the said *LONDON* and his brother *James* bought of *Susanna*, Executrix of said *Andrew Hart* deceased." And *Stovall* on his part agreed to convey to *London* all his land "lying in the County of Campbell on the waters of Rock Island Creek whereon his mother *Elizabeth* *Stovall* then resided, and all other land he had purchased or might thereafter purchase adjoining the first mentioned Tract, which said Tract was willed him by his father." In consequence of this "exchange and conveyance in law," the parties agreed to submit each of the said tracts of land, "as soon as convenient, at farthest on or before the 1st day of May, 1810," to valuation, by each person choosing his own valuer, and, in case they disagreed, for them to choose a third man, whose Judgment should be final. In case *Stovall's* land should be valued higher than *London's*, the latter was to pay the former four hundred dollars "next September, if that sum should be due," and, if more, the balance to be paid in two annual payments, unless *Stovall* would take negroes at valuation. *Stovall* agreed, "to let the said *London* seed the land, or any part he might choose, after the usual time of seeding takes place, next Fall, and to convey with general warranty the said Tract of Land to *London*, on or before the first day of September next." As *Elizabeth Stovall* had her life estate in part of the said Land, if she gave it up to *Stovall*, it was to be

1. Under what circumstances, in a suit in Equity for specific performance of an agreement for an exchange of lands, the Court may decree according to the prayer of the Bill, without a reference to a Commissioner of the plaintiff's title, though objected to by the defendant in his answer.

2. The most important circumstances in this case appear to have been that the title by which the lands of each party were held, was set forth in the written agreement; and that the defendant, after filing his answer, received a sum of money agreed to be paid for the difference in value between the tracts to be exchanged.



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1816.

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v.  
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No motion was made by *Stovall* to refer the title of *London* to a Commissioner for examination; and no testimony was exhibited on his part. Two Copies of Deeds attested by *John Hutcheson* Register of *Robertson* County, were inserted in the transcript of the Record; though not mentioned in the Bill or Answer;) one of which Deeds was from *James London*, and the other from *Susannah Hart*, to *John London*, for 320 acres each; and, in both, the Land conveyed was described as "lying in the County of *Robertson*, and State of *Tennessee*, "on the North side of *Sycamore* Creek adjoining a Survey of "*Robert Weakly's*, known by the name of the Horse stump," and also by courses and distances.

Chancellor TAYLOR, "being of opinion that, as the plaintiff has fully performed the agreements in the Bill mentioned, "on his part, except so far as he was prevented by the defendant, "the defendant ought on his part to perform the same agreements," therefore decreed, "that he execute a Deed, with general warranty, to ensure an estate of inheritance in the "Lands sold by him to the plaintiff, subject to *Elizabeth Stovall's* life estate in part thereof; and that the said defendant "deliver the said Deed, with the possession of the said lands, "to the plaintiff, and account for the profits thereof, since the "first day of November 1810, before a Commissioner of the "Court, who is to state and report the same, with such matters "as he may deem pertinent, or which either party may require. "And being farther of opinion that, until there is a valuation "of the Lands sold by the said defendant to the plaintiff in "the State of *Tennessee*, the annual allowance of twenty "pounds on account of the life estate as aforesaid should not "be decreed at this time," he farther adjudged, ordered and decreed that, "unless the said defendant shall, forthwith after "being served with a copy of this Decree, proceed, in conformity with his agreement of the 11th of September 1809, "to appoint a valuer of the said Lands in *Tennessee* described in that agreement, *Robert Weakly*, and such other persons as the said plaintiff shall name, shall be and they are "hereby appointed for that purpose; and, in case of their disagreement, they are to choose a third person; and they are "required to report their proceedings to this Court in order to "a final Decree."

From this Decree the defendant prayed an Appeal, which the Chancellor allowed.

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1816.

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v.  
London

*Wickham* for the Appellant. I do not contend that the Bill ought to be dismissed in the first instance; but the title of *London* to the Land in Tennessee should be referred to a Commissioner for investigation. (a)

(s) *Sugden*,  
155; *Beverley*,  
v. *Lanzen's*  
heirs. 3 *Munf.*  
317.

As he comes into a Court of Equity for specific performance, he is bound to shew that he has made, or can make a good title. The title ought to be free from *suspicion*; (b) for a purchaser is not bound to take a defective title, and no man is obliged to buy a law suit.

(b) *Sugden*, 210.

The Contract was that he should convey the Land by Deed with general warranty. And, since a Deed by a person not in possession does not operate as a Conveyance, it was incumbent upon him to prove that he was in possession of the land. Besides, the description in the Conveyance must correspond with the specific Tract of Land agreed to be conveyed; which is not the case in the present instance. The proofs of title exhibited are also very defective. No Grant is shewn for the Land; no title whatever in *Andrew Hart*; nor is there any proof of the right of his Executrix to convey. *James London's* title to the 320 acres bought of him is not shewn: there is no subscribing Witness to the Deed from him; and neither of the Deeds is properly authenticated.

With respect to the Deed from the plaintiff himself; the privy examination of his Wife ought to have been taken upon a Commission from the State of Tennessee, where the Land lies; not from Amherst County Court in Virginia.

The Chancellor should have examined the title and taken notice of these defects, even without a reference to a Master. He erred also, in appointing persons to value the Land. *Stovall*, on his part, was not bound to proceed to appoint a Valuer until the title papers were shewn him.

*Munford contra.* The plaintiff was not bound to shew his title, it being admitted by the agreement, or acquiesced in by the defendant, who received the money lodged with *George Cabell* for him, though he raised a dispute at first. By doing so, he waved the objections he had taken to the title. The

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peculiar terms of this Contract are worthy of notice. The title, by which each party held his Land, to be exchanged for the Land of the other party, is specially set forth; shewing an agreement to part with one title for the other, *such as they were*. An *Exchange* of Lands differs in this respect from other purchases. The defendant has not shewn, and was not bound to shew, *his own title* to the Land, which *he* was to convey; and has no right to call for proof from the plaintiff of his title to the land conveyed by him.

A reasonable performance on our part is all that can be expected. The defendant failed to appoint persons to value the Tennessee Land. He did not *demand* of the plaintiff the production of his title papers, until after the suit was brought. And no objection was made in the Court of Chancery, to the authentication of our title papers, nor to their sufficiency. He must have been acquainted with the title, and with the value of the plaintiff's Land; else why did he receive the money?

A reference of the title to a Commissioner is not to be made *without consent of the purchaser*; for he *may* buy a defective title if he chooses. In this case *Stovall* did not move (a) *Sugden*, 155. the Chancellor to direct a reference, (a) and it is too late to make such motion in the Court of Appeals.

The relinquishment by *London's* wife was regularly made by a Commission from Amherst Court. This Court has no jurisdiction over the Lands in Tennessee. The Decree operates *in personam* not *in rem*. But even if the title of the Wife were out standing, a Deed from *London* himself, with *general warranty*, is sufficient to satisfy the terms of the agreement.

*Wickham* in reply. *Stovall* is bound to specific performance by his accepting *part* performance from *London*. But he is not bound to accept *partem pro toto*. He did not receive the money as *full* satisfaction. I admit he is bound to return it with Interest, if a good title be not made.

The description of each Tract in the agreement was not a description by *both* parties as to *each*, but only by the party undertaking to convey. The other party was not to be supposed conusant of any title but his own. The very circum-

stances that the Lands were to be *valued* shewed that *Stovall* **DECEMBER, 1816.**  
knew nothing of the Tract in Tennessee.

A conveyance, according to the laws of Virginia, is not good, where the Contract is to be carried into effect in another country. In such case the law of that country is to prevail.

*Stovall*  
v.  
London.

*December 14th, 1816*, the President pronounced the Court's opinion, that there was no error in the Decree, which therefore was affirmed.

## Boyd and Swepson and others *against* Stainback and others.

Decided January 17th, 1817.

THIS was a suit in the Superior Court of Chancery for the Richmond District in behalf of *Boyd and Swepson* and other persons, who sued as well for themselves, as for others, the creditors of *Daniel Shelton* deceased, who might come in and be contributory to the costs, against *William Stainback* the father-in-law, *Charlotte Shelton* the widow, and *James Hester*, Sheriff of Mecklenburg County, to whom the estate of said decedent, who died intestate, was committed.

The Bill stated that, at the time of the Intestate's death, he was possessed of a considerable estate in Slaves and other personal property; but the defendant *Stainback* pretending that the same had been lent by him to the said decedent in his life time, took the whole of the Slaves and greater part of the other property into his possession, and removed them from the County of Mecklenburg to the County of Brunswick; that

1. A demand of slaves by the lender, who thereupon receives, and immediately redelivers them to the Loanee, to be held on the same terms, as before such demand, receipt, and re-delivery being in private is not sufficient to bar the rights of creditors, under the Act to prevent Frauds and Perjuries.

2 A Loan of Slaves, though not declared by Deed in writing duly recorded, and therefore

void as to Creditors, the Loanee having continued in possession five years without such demand, as would bar their right, is nevertheless effectual between the parties and their representatives. If, therefore, the Loanee die in possession of such Slaves, they are not to be considered assets belonging to his estate, nor can be recovered as such; being liable to his Creditors so far as their claims remain unsatisfied by the assets in the hands of his Executor or Administrator, but no farther.

3. In such case, if the Assets be deficient, a Court of Equity will give the Creditors relief, on a Bill in their behalf against the lender and the Executor or Administrator of the Loanee; making the Assets liable in the first place, so far as they extend; after which, it will allow the lender a limited time to make good the deficiency, and, in default thereof, direct a sale of the slaves.

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son and others  
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others.

the said decedent *Daniel Shelton* had been in possession of the Slaves in question, exercising every act of ownership over them for fifteen years previous to his death; and therefore that the pretence, under which the said *Stainback* took possession as aforesaid, was fraudulent and void as to the creditors of said *Shelton*; that *James Hester*, the Sheriff, to whom the estate of the decedent was committed, alleged that only a few trifles had come to his hands; and, as the plaintiffs believed, there was a deficiency of assets in his hands, wherewith to pay their claims. They were also informed that the widow had some of the property in her possession, and confederated with the said *Stainback* to defraud the creditors by secreting and converting the decedent's estate to their own use.

The prayer of the Bill was for a discovery of the assets in general, and of the Slaves in particular; that the defendants *Stainback* and *Shelton* be decreed to deliver up the Slaves and other assets of the decedent, for payment of the claims of the plaintiffs; and account for the hire and profits; and that the plaintiffs might have such other and farther relief, as the nature of their case required.

From the answers of the defendants, the depositions and exhibits in the cause, it appeared that the Slaves had been lent by the defendant *Stainback* to the said *Daniel Shelton*, without any Deed in writing duly recorded, declaratory of such loan, and had remained in possession of the latter until his death, being more than five years, without any substantial or *bona fide* interruption of such possession; though it was proved that *Stainback* had frequently, *in private*, or when none but relations were present, demanded the negroes, received them from his daughter the wife of *Shelton*, or from *Shelton* himself, and *immediately re-delivered them*, to be held on the same terms as before. It appeared, moreover, from the answer of *James Hester*, that the property which came to his hands had been sold for a sum insufficient to satisfy the claims of the plaintiffs.

Chancellor TAYLOR was of opinion, "that the plaintiffs " had not made a proper case for a Court of Equity, since " there was, by their own shewing, a legal representative of " their debtor *Daniel Shelton*, who might be pursued at law, " and whose duty it was to pursue the assets of the said *Da-*

" *niel Shelton*, and to recover the same for the benefit of his  
 " creditors, to be apportioned among them without regard to  
 " the dignity of debts, if there should not be a sufficiency to  
 " pay the whole; but, if there were more than sufficient, to  
 " distribute the balance as the law requires; which in no wise  
 " devolved on the Creditors." He therefore dismissed the  
 Bill with Costs; without prejudice to any suit, which the  
 plaintiffs might be advised to institute at law.

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 son and others  
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 others.

From this Decree the plaintiffs appealed to this Court,  
 where, the cause being submitted without argument, the fol-  
 lowing opinion was pronounced on the 17th of January 1817.

" It appearing that the Slaves, in the Bill and proceedings  
 " mentioned, were loaned by the defendant *Stainback* to the in-  
 " testate *Daniel Shelton* or to his wife, and that the same re-  
 " mained in the possession of the Intestate until his death,  
 " and more than five years without such loan being declared  
 " by Deed in writing, recorded according to law, or such de-  
 " mand thereof by the lender, as is contemplated by the Act  
 " of Assembly in such cases in order to bar the rights of cre-  
 " ditors; the Court is of opinion, that the said loan, though  
 " void as to creditors, was nevertheless effectual between the  
 " parties and their representatives; and that, therefore, the  
 " slaves aforesaid were not *assets* in the hands of the defend-  
 " ant *Hester*, to whom the estate of the said Intestate was  
 " committed by the County Court, nor could they be recover-  
 " ed by him as such, being only liable to creditors *so far, as their*  
 " *Debts remain unsatisfied by the assets in his hands.* The De-  
 " cree of the Chancery Court is therefore reversed with Costs;  
 " and the cause is remanded to that Court, with directions to  
 " have an account taken of the administration of the defend-  
 " ant *Hester*; of the Debts due from the Intestate *Daniel*  
 " *Shelton*, and to Decree a payment of those Debts out of the  
 " assets in the hands of that defendant, so far as the same  
 " shall extend; and the balance to be paid by the defendant  
 " *Stainback* within a time to be limited by that Court; and, in  
 " default thereof, that the Slaves in the Bill and proceedings  
 " mentioned, or so many of them as may be necessary for  
 " that purpose, be sold for the purpose of paying said balance."

Decided, January 20th, 1817. **Jackson's assignees against Cutright and Clark.**

1. After issue joined, and the cause set for hearing, the defendant in Chancery may be permitted, for good cause shown, to amend his Answer, and to plead the statutes of frauds and limitations. IN May, 1810, *William Haymond* and *John Webster* assignees of *Edward Jackson*, a Bankrupt, (so declared under the Act of Congress then in force,) filed their Bill in Chancery in the County Court of Harrison, against *John Cutright* and *William Clark*, to compel performance of a *parol* agreement of the defendant *Cutright*, to convey a tract of land to the said *Jackson*, which, in violation of that agreement, he sold and conveyed to the defendant *Clark*, who purchased with full knowledge of *Jackson's* title, as the Bill alleged. No answer was put in by *Clark*, and no proceedings against him appear in the Record.

2. A mistake of the defendant's counsel, in advising him that he could avail himself of the defence without pleading, is sufficient ground for leave to file the pleas, in addition to the Answer. In November, 1810, an order was made that *Cutright* should appear on the first day of the next Court, to answer *interrogatories*. He came at that time by his attorney, and, on motion, had leave to file his Answer, which was accordingly done; but, at the same time, it was farther ordered, "that the said *Cutright*, during this term, or on the first day of the next Court, appear in Court and answer Interrogatories here filed; and that he be attached by his body until he perform this Decree."

3. It seems, that payment of the purchase money is not sufficient part performance of a verbal contract for land, to take it out of the statute of frauds. In obedience to this order, he appeared, and his Answers to the Interrogatories were committed to writing, and inserted in the Record. In October, 1811, on his Petition filed, leave was given to amend his Answer: whereupon, by way of such amendment, he alleged that the agreement, if it ever was made, was an actual or constructive *fraud* on him; and also pleaded the statutes of frauds and perjuries, and for limitation of actions, in bar of the plaintiff's claim. To the defendant's being permitted to make this amendment, the plaintiffs objected, "as inadmissible, after an indulgence granted to the defendant in permitting him to file his answer heretofore; and because the cause stood now for trial, and was heretofore continued at the defendant's request; and the pleas were not to the *merits*; but the Court overruled the objections, the counsel originally employed by the defendant stating, that he conceived the defence could be made without specially relying on it."

The other circumstances of this case are fully set forth in the following opinion of Chancellor *CARR*. The County Court, on hearing the cause, dismissed the Bill with costs; from which

Decree, the plaintiffs appealed to the Superior Court of Chancery holden at *Clarksburg*.

In October, 1813, Chancellor CARR pronounced the following Opinion and Decree.

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"The Bill states a verbal contract between *Edward Jackson* and the defendant *Cutright*, by which it was agreed that if *Edward Jackson* would clear out, and pay all expenses attending the procuring a Patent, to a pre-emption right, which the said defendant had to a certain quantity of land, that *Edward Jackson* should be entitled to one half of the land thus secured; that *Edward Jackson*, in pursuance and in execution of this contract, did procure for said defendant the Warrant, Entry, and Survey, and patented 733 acres of land: that said defendant had often acknowledged the contract, and proposed to *Edward Jackson* to draw a deed for his part of the land, which, through confidence in said defendant, had been deferred; that said defendant had sent different persons to purchase his part of said *Edward Jackson*; that, at length, taking up the idea of defrauding said *Edward Jackson*, the said defendant had entirely refused to execute his part of the contract by conveying to the said *Edward Jackson* his portion of the land; that he has sold part of the tract to one *Clark*, who had notice of *Edward Jackson's* claim, and is made a defendant; and the plaintiff prays a specific execution of the contract."

"*Cutright's* Answer states, that he had heard that there was a verbal agreement, or conversation rather, between *Edward Jackson* and this defendant's father, that if *Edward Jackson* would get the Warrant, he might have half the land. In his answer to the first interrogatory, he says, he does not recollect making such a contract himself; but that, it is possible, he might have agreed to fulfil his father's. He believes *Edward Jackson* purchased the Warrant; but he does not know whether at his own expense; that he paid *Edward Jackson* ten dollars, not long before he got the papers, to send to *Richmond* for the Patent; that he heard *Edward Jackson* say the Warrant cost him twenty dollars: and he has a strong recollection that he heard his father say, in his life time, that he had paid for it; that *Edward Jackson* claimed half the land, (under the old contract with his father, as he supposes,) but said if the defendant would give him the residue of the 1400 acres, (after deducting




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the 1130.) and 18l. in cash, defendant might have the whole land ; which the defendant avers he did do. This new agreement in the close of the Answer, not being responsive to the Bill, needs the support of other evidence to establish it. There appears none. This is the case on the Bill and Answer : of the evidence I shall take notice presently.

Before I proceed to consider the merits of the case, it may be proper to notice some irregularities which have occurred in its progress through the Court below. If the defendant does not file his answer within three months after the filing of the Bill, having also been served three months with the subpoena, the plaintiff may have either a general commission to take depositions, (which course he will generally pursue, where he does not need the aid of the defendant's answer,) or he may have the defendant brought in to answer interrogatories ; (and this he will do, where his Bill seeks a discovery, and he cannot make out his case without an application to the defendant's conscience :) in either case, he may proceed on to hearing, as if the Answer had been filed and the cause at issue. But the Court, for good cause shewn, may allow the Answer to be filed, and give a farther day for hearing. Under this law, the complainants, at the November Court, 1810, obtained an order of Court, for bringing in the defendant at the next Term to answer interrogatories. At the next Term, however, it should seem that the defendant shewed good cause to the Court in excuse of his contempt, for he was then permitted, on motion, to file his Answer. Thus far all is correct. And, now, the order bringing in the defendant to answer interrogatories, should have been discharged for two reasons, first, because, by coming in and shewing such cause, as induced the Court to prevent the filing of the Answer, he has cleared his contempt : 2dly, because, by filing the Answer, the interrogatories became useless : for no interrogatories could properly be filed, but such as were extracted from the plaintiff's bill, and fairly pertinent to the case stated in it : and to all such the Answer would respond if sufficient, and if insufficient, the Court would have refused to receive it, but would have considered the defendant still in contempt, and directed the proper proceedings. Instead of this course, the Court, at the same Term, at which they received the defendant's Answer, ordered that he should, either at that

or the next Court, answer the interrogatories, and that, in the mean time, he should be attached by his body : in other words, taken into actual custody. This order was certainly improper. There is another error in this Record; probably a clerical error. By the Act of Assembly constituting and regulating the Chancery Court, it is enacted that, after a general commission, six months shall be allowed for taking depositions, and either party at the end of six months may set the cause for hearing. It does not appear from the Record, that this cause was ever set for hearing. I think that step ought to appear: of this, however, I am not very certain."

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"Having noticed these irregularities, I shall proceed with the cause. But, before I come to its merits, there is still another preliminary point to settle; that is, whether the Court below did right, in permitting the defendant, on the cause shewn by him, to amend his Answer, by adding the pleas of the statute of frauds and perjuries, and the statute of limitations. I have examined this question with some attention. Courts of Chancery, without difficulty, permit amendments in small matters, before issue joined; but, after issue joined, depositions taken, and the cause ready for hearing, they are extremely cautious of permitting a defendant to amend his Answer; and for this strong reason: the plaintiff's case is now fully disclosed; the defendant is fully apprized of the weight of his evidence; he feels where it presses most heavily, and where his own cause is weakest, and most in need of support: to suffer him, at this time, to avail himself of his own oath by way of amendment, would be to give him an unfair advantage, and hold out too strong a temptation to perjury. It ought, therefore, but *rarely* to be permitted. There are cases, however, in which Courts do suffer it; for there is no fixed rule on the subject, (say the books,) but every application of this kind is to the discretion of the Court. In the case of *Liggon v. Smith*, reported in 4 *H. & M.*, 405, the Chancellor of the Richmond District, after reviewing most of the English cases on the subject, concludes that, under some circumstances, leave to amend his answer may be given to a defendant; and lays down rules for regulating such motions in his Court. In *Pearce v. Grove*, 3 *Atk.* 522, the Court refused to allow the defendant to amend his Answer, by striking out of it the admission of a fact, by which the plaintiff would be deprived of it as evidence;

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especially, as he did not swear that he was surprised into the admission of it, or ill advised in setting it forth: from which it would seem, that, if the defendant had sworn to surprise or ill advice in setting forth the fact, the Chancellor would have suffered the amendment. In 1 *Bac. Abr.* 171, it is said, "There are no certain rules for the amendment of Answers, but they are in the discretion of the Courts; the admission of a fact is never suffered to be struck out, but on affidavit of surprise, or the defendant being ill advised. But, where an amendment is admitted in the Bill, where through inadvertency, a mistake is made as to a fact or date, *where there is no danger of perjury*, where the case depends upon old documents, &c. &c. the Courts have allowed amendments to be made, either by striking out passages, or making new facts, and this after issue joined, or upon the hearing of the cause."

Let us apply this law. In the case before us, the defendant in his petition swears that he had, from the beginning, relied on the matters, contained in his amendment, for his defence; that he had instructed his Attorney to use them to that end, and rested satisfied under the belief that it was done; that it was omitted through the mistake of his Counsel, &c. Now it would seem to me, that if surprise or ill advice be considered, as a good ground for amendment, it must be equally a good one that the Attorney, although properly instructed by his Client, neglected, or mistook the proper mode of availing him of a particular ground of defence. But there is still a stronger argument in favour of this amendment. The principal ground, the main objection with Courts, to suffering amendments to Answers, is the strong temptation it holds out to Perjury. In the page above quoted from *Bacon*, it is said that, *where there is no danger of perjury*, Courts will permit Amendments. Now it seems to me that, if there ever was a case in which an Amendment could be permitted without danger of Perjury, the present is such an one. The Amendment is merely an attempt by the defendant to avail himself of the Statute of Frauds and Perjuries, and the Statute of Limitations. In this there could be no Perjury; for, whether these Statutes constituted a Defence was matter of law and not of fact. I think, therefore, that the Court below were right in permitting the amendment. See 1st *Munf.* 514, where Judge

TUCKER, in stating the case, says, "In an amended Answer, " which he was permitted to file, the defendant insists upon " the benefit of the Statute of Frauds and Perjuries." This shews the Amendment was permitted, though not at *what* stage of the cause. But, whether the Court were right or wrong in the permission given seems a matter of but little consequence, as respects the case, if the defendant, without relying on the Statute of Frauds and Perjuries either by Plea or in his Answer, might have the benefit of it at the hearing: and this I rather believe to be the fact. The English authorities are both ways, and rather tend to involve the point in confusion and doubt, than to establish any clear rule. The only judicial opinion, which I have met with in our Reports, on the subject, is that of Judge TUCKER in *Argendright v. Campbell*, 3 H. and M. 144. After expressing his opinion, very decidedly, that the Statute ought to be noticed by the Court, though not relied on by Plea or Answer. he says, " And this construction I am the more confirmed in by the " opinion of Lord *Loughborough*, and the other Judges, (except *Wilson* absent,) in the case of *Rondeau v. Wyatt*, (2 H. Bl. 63,) who says, if a parol agreement were stated in a " Court of Law, and there was a *Demurrer*, which would admit the agreement, yet still advantage might be taken of the " Statute." After which quotation, Judge TUCKER adds, " And " surely *equity* is equally bound to notice it, though not pleaded or relied on in the Answer; for it is a Public Statute, " and as such ought to be noticed by the Court." I incline, therefore, to think that, even without the Amendment, the defendant could have availed himself of the Statute of Frauds and Perjuries.

Let us now consider the case, made by the Record, upon its merits. The Bill states a parol Contract for Land, with acts of part performance, and prays a specific execution. The Answer states that defendant had heard of such verbal Contract between plaintiff and his father, but denies having made such an one himself: and this denial, though not a very positive one, (for he only says that he does not recollect making such a Contract,) is certainly no admission, but is a sufficient denial to put the plaintiff on the proof. The defendant also pleads the Statute of Frauds and Perjuries and the Statute of

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**Limitations.** The 1st question will be has the plaintiff made good his case, by the evidence? 2dly. How does the Statute of Frauds and Perjuries affect it? 3dly. Ought a Court of Equity, after the length of time which has elapsed, to lend its aid to carry it into execution? It will be recollected that in Chancery, as at Common Law, the allegata and probata must always agree. The plaintiff must prove the case which he sets out in his Bill; and, although he should make out in evidence a good case, which, under other circumstances, would secure the interposition of the Court, yet, if it be not the very case made by the Bill, it will not support the Bill. The case, here stated by the plaintiff, is that the defendant agreed with the plaintiff that, if he would clear out the land, and get a Patent at his expense, he the defendant would convey to him the one half; and that, in execution of this Contract made with the defendant, he the plaintiff did procure a Warrant, survey the Land, and obtain the Patent. The Answer acknowledges that the defendant had heard of a verbal Contract, to the effect stated in the Bill, between the plaintiff and his father. but denies that the defendant himself ever made such a Contract. That part of the Answer, which states the existence of a Contract between the complainant and the defendant's father, is supported by the deposition of Samuel Pringle, who says that, "in the fall of 1787, he and "old Mr. John Cutright senior fell in conversation, and said "Cutright informed the deponent, that he had agreed to give "Edward Jackson a part of his Land for clearing it out." A question, too, asked the same Witness by the plaintiff, seems to strengthen the idea that the Contract was made with the father: he asks, "did you not hear the defendant Cutright say that Edward Jackson had stopped his money somehow in settlement, and for that he would not let him have the land that he was to have from his father? Here then is the answer thus corroborated, proving a Contract with the father. Let us see whether there be any evidence to establish a Contract with the son. The deponents Joseph Hall and Mary Carney state that, "about 14 years ago they heard the defendant say "that, if Edward Jackson died, he should be the gainer, for "there was land in partnership between them; that the Patent was in his name, and Jackson had not the scrape of a

"pen." *Isaac Cutright, Samuel Warner, Zachariah Westfall and John Westfall* state that, "about 12 or 14 years ago, they respectively made proposals to the defendant to buy a particular part of his land; he said they must go to *Edward Jackson* and purchase it, and he would make a title." *John Casto* says that, "about 19 or 20 years past, he applied to the defendant to buy land, who told him that one half of the pre-emption right belonged to *Edward Jackson*." *William Pringle* says that, "he has often heard the defendant say that *Edward Jackson* was to have one half the pre-emption right for clearing it out of the office."—*Thomas Carney* says, "that, about 14 years past, the defendant asked him if he thought *Edward Jackson* could take any of his land, as he had a deed for the whole? The deponent inquired if *Edward Jackson* had any writings? He said, No! How did he claim it? For getting it out of the office below, and getting a Patent, for which *Edward* was to have half." This is all the evidence on the subject of the Contract. It certainly proves that, at the time of the conversation spoken of by the Witnesses, the defendant supposed that the plaintiff had a right to one half of the pre-emption Tract, and that he derived this right from a Contract with somebody. And, if there were nothing in the Record pointing to a different person, we should naturally, perhaps necessarily, conclude that the defendant himself was the person, with whom the plaintiff had made this Contract. But we have already seen, that there was precisely such a Contract, as these conversations describe, made between the plaintiff and the father of the defendant. When, therefore, the defendant said, that there was land in partnership between *Edward Jackson* and himself,—when he sent persons to buy of *Edward Jackson*, saying that he would make the title,—when he said that *Edward Jackson* was to have half the pre-emption right for clearing it out;—ought we to consider these confessions, as referring to the Contract between *Edward Jackson* and the defendant's father, which Contract is proved by distinct testimony, and to which they are perfectly applicable? or ought we to make them the evidence of a new Contract, between the plaintiff and the defendant himself, which is denied by the Answer, and of which there is no other evidence in the record? To my mind

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it seems, that we must refer them to the Contract between *Edward Jackson* and the defendant's father; and I must consider them as expressing the defendant's opinion as to the rights of *Edward Jackson* under that Contract. Let it be observed that none of the observations made by the defendant designate a Contract made by himself. He is no where related to have said, "I have agreed to give *Edward Jackson* one half of the pre-emption right for clearing it out; but he says, "*Edward Jackson* is to have;" "*Edward Jackson* has a right "to one half;" "There is Land in partnership between us:" a style rather more likely to have been used, I think, in speaking of his father's Contract, than of one made by himself. I therefore conclude, as to this point, that the plaintiff has not proved this case. But it may be said, that he has proved a case against the father; and if he was entitled to a specific performance as against him, the Contract would equally bind his representatives, and which is certainly the law. But the objection here is that the plaintiff has sued on a Contract, made with the defendant himself, and can only recover by supporting his case. If he had sued the defendant, as representative of his father, and charged a Contract made with the father, his right to a specific execution against the representatives would have been as strong as against the father: but that would have been a different case; the defendant must have been sued as Heir, and the Writ must have taken in all the Heirs.

Having decided that the plaintiff has not supported his Bill by the evidence, it may seem unnecessary to touch the other points with respect to the Statutes. I will, however, say a few words as to each. The Statute of Frauds and Perjuries, I consider a most excellent and beneficial Statute, and founded in much wisdom; and I sincerely wish that the Courts of England had been as anxious to execute it strictly, as they seem to have been to search out and catch at circumstances to take cases out of its operation. They have taken, in construing it, an unbounded latitude. One consequence of which is, that, in many cases, their decisions amount to an actual repeal of the Statute, and the introduction of the very evils, which it meant to prevent. Another consequence of leaving the plain letter of the Statute has been, that the Judges, hav-

ing no guide but their own discretion, seem to have been wandering in a field without path or limit. Every one has thought he was at liberty to strike out a way for himself; and there are nearly as many varying opinions, with respect to the extent and application of the Statute, as there have been Chancellors on the English Bench. These clashing decisions present a chaos, from which it has baffled the ingenuity of their ablest writers to produce order or light. Any one who will read *Roberts*, *Sugden*, *Fenblanc*, or *Newland*, on this subject, will see at once the extent of the evil. Indeed, the English Judges themselves have become sensible of it, and in their latter decisions are visibly returning to a more strict and rigid construction of the Statute. They all (as may be seen from the latest writers and reported cases,) begin to think with Lord KENTON, who, in *Chater v. Beckwith*, 7 Term Rep. 201, says, "I lament extremely that exceptions were ever introduced, in construing the Statute of Frauds. It is a very beneficial Statute: and, if the Courts had at first abided by the strict letter of the Act, it would have prevented a multitude of suits, that have since been brought."

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In our own Courts, but few decisions on the Statute have taken place; but, from their spirit, and from the observations of some of the Judges, it is much to be hoped that, by keeping to the letter of the Act, they will avoid the dilemma into which the English Judges have brought themselves. Thus much of the Statute in general. The particular point on which it was supposed, that the cause before us was taken out of the Act, was a part performance by the plaintiff, in purchasing the Warrant and paying the money necessary in clearing out the land. That there are some acts of part performance, which will take a cause out of the Statute, seems to be generally agreed: but, what are such Acts, is a point which has exceedingly divided and embarrassed the Judges; particularly, whether the payment of money be such an Act? In *Lason v. Martins*, 3 Atk. 1.; *Dickinson v. Adams*, cited 4 Vesey, jr. 722; *Main v. Melbourn*, 4 Vesey, jr. 720, and several other cases, it is decided, that the payment of money will take a case out of the Statute. In 1 Term Rep. 486; 2 Cha. Cases 135, *Leak v. Morrice*, 1 Vern. 472, *Alsopp v. Patton*; Prec. in Ch'y. 580, *Sengood v. Meale*; 2 Eq. cases abr. 46, Lord Fin-



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*gall v. Ross*; it is decided, that the payment of money is not an available part performance. Sugden, in his law of Vendors (a late and very excellent treatise) brings all these warring authorities together, and observes, "Upon the whole it appears clearly that, since the Statute of Frauds, the payment of a small sum can not be deemed a part performance. The dicta are in favour of a considerable sum being a part performance; but it is clear, that this construction is not authorized by the Statute; and it is opposed by a case in which the contrary was decided upon the most convincing grounds;" and he cites *Butcher v. Butcher*, 9 Vesey, jr. 382. After some farther observations, he adds, "Since the above observations were written, a decision of Lord REDESDALE's has appeared, in which he held clearly, that payment of purchase money is not a part performance; and, although his Lordship did not advert to all the cases on the subject, yet it is sincerely to be hoped, that his decision will put the point at rest." The case here referred to is, that of *Clinan v. Cook*,<sup>1</sup> *Schoales and Lef.* 22, in which Lord REDESDALE, after reasoning at considerable length, and with great ability, decides that the payment of money will not take a case out of the Statute. *Newland*, in his treatise on Contracts, which I would recommend to the perusal of every lawyer, speaking on this subject, says, p. 187, "If this point be considered with respect to the obvious intention of the Legislature in passing the Act, and to the principle on which Courts of Equity proceed, in permitting a part performance of an agreement to be a ground for avoiding the Statute, this case can not be deemed to be excepted out of it." After some farther observations, he adds, "This point, however, is involved in much perplexity, by the jarring opinions of the Court upon it."

From the best opinion I have been able to form on this subject, after considerable reflection, I incline to think, that the payment of money is not such a part performance as will take a case out of the Statute.

Now as to the Statute of Limitations. When this contract was made does not exactly appear. *Samuel Pringle* heard of it in 1787,—26 years ago. *John Casto* heard of it 19 or 20 years past. The patent is dated in 1795,—18 years ago. Al-

though it does not appear exactly how long, it has evidently been a very long time since the plaintiff knew, that the defendant refused to execute and denied the contract. The Record presents no grounds to excuse this negligence. The time of the Bankruptcy is no where stated; but, if it had been, it could furnish no ground to stop the running of the Statute: for it was as much the duty of the assignees to proceed diligently, as of the Bankrupt. Where application is made to a Court of Chancery for specific performance of a Contract, all the circumstances are taken into view: among others, the length of time, if considerable, is always thought a very weighty objection: it necessarily operates a change in the situation of the parties, and the subject matter of the contract. In *Main v. Melbourn*, 4 *Vesey, jr.* 720, a Bill was brought for specific performance of a contract, by which a right of common, which had been allotted to the defendant, was sold by him to the plaintiff; the defendant pleaded the Statute of Frauds, and it was allowed. The Chancellor, in his opinion, says, that it was better for the plaintiff to allow the plea, for that he should dismiss the Bill on the circumstances; and states a very material circumstance to be, that the plaintiff had rested five years before he brought his Bill; during which time, the property must have appreciated. In *Harrison v. Harrison*, 1 *Call* 419, Mr. PENDLETON delivering the opinion of the Court, says, "There is no positive direction in the Statute (of Limitations meaning) that the Court of Chancery shall be bound by the periods prescribed in the law; but that Court adopts them by analogy to the rules of law." But the strongest and most forcible remarks, which I have seen on this subject, are contained in the opinion of that excellent Judge, Lord CAMDEN, in the case of *Smith v. Clery*, reported by *Ambler*, p. 645, and cited in *Bro. Ch. cases* 639. He says, "A Court of Equity, which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where a party has slept upon his right, and acquiesced for a great length of time. Nothing can call this Court into activity, but conscience, good faith, and reasonable diligence: where these are wanting, the Court is passive and does nothing. Laches and neglect are always discountenanced; and, therefore, from

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"the beginning, there was always a limitation to suits in this Court. *Expediit Reipublicæ ut sit finis litium*, is a maxim, that has prevailed in this Court, at all times, without the help of an Act of Parliament. But, as the Court had no Legislative power, it could not properly define the time of Bar, by a positive rule, to an hour, a minute, or a year. But, as often as Parliament had limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery adopted that Rule, and applied it to similar cases in Equity. For, when the Legislature had fixed the time at law, it would have been preposterous for Equity (which by its own proper authority had always a limitation) to countenance laches beyond the period, that Law had been confined to by Parliament; and, therefore, in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same Bar."

To this doctrine I heartily and entirely subscribe. It may be said, that there is a trust here, which will prevent the Statute from applying. But I can see no farther trust, in this case, than in any other where a party, without complying with the requisitions of the Statute, goes on to perform a part of the contract himself. In every such case, he trusts to the honor and good faith of the other party; and, if this trust would prevent the Statute from running, no length of time would stand in the way of a party seeking a specific execution on the ground of part performance: but this we know is not the case; for no rule is better settled, than that a party seeking a specific performance must come recently, and not sleep upon his case. I conclude, therefore, that even if the case in the Bill were sustained, a Court of Equity ought not, after this length of time, to lend its aid to the plaintiff. I have not decided in my own mind, whether the errors in the Court below, noticed in the early part of this opinion, are sufficient to reverse the Judgment of that Court: for, as the plaintiff has shewed a case, which under no circumstances would justify a Decree in his favour, it would, I think, be worse than useless to send the parties back, and, by keeping them longer in litigation, multiply costs and trouble. In one point, however, I differ with the Court below; the giving costs to the

defendant. Although the defendant is protected, by the law and the circumstances, from a Decree against him, yet I have a strong suspicion, that he has neither acted with honor nor good faith. I shall not, therefore, give him costs, either here or in the County Court; but shall direct, that each party pay his own costs, both here and there. With this exception, the Decree of the Court below is affirmed."

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The plaintiff appealed to the Court of Appeals.

*Nicholas* for the Appellant. The County Court erred in decreeing without an Answer from *Clark*, the other defendant. It was essential to the decision, that his Answer should have been before the Court. Yet he never answered, and no decree nisi was served upon him.

2. The Court ought not to have permitted the defendant to amend his Answer, *after issue joined*, for the purpose of pleading the Statutes of *Frauds* and *Limitations*. Leave to amend the answer is matter of discretion, and not allowed, after issue joined, except under very special circumstances. (a) There should not only be an *affidavit*, but notice to the plaintiff, and payment of costs. In this case, leave was granted without notice, and costs were not required to be paid. Amendments may be allowed where *facts* have been omitted by mistake; but it is not right to permit the party to amend upon a supposed mistake of the *law*, as was the case here. (b) The Court, too, will not permit an amendment by pleading the statutes; for such a plea does not go to the equity of the case, but rather destroys it. A Court of Law will not allow a defendant to set aside an office judgment by pleading the Act of Limitations; because it is not an *issuable* plea. So, in a Court of Equity, where the defendant has, by Answer, admitted the agreement, and submitted to perform it, he cannot afterwards plead the Statute of Frauds, (c) even in answer to an amended Bill. (a) *Wyatts. Pr. Reg. 30.* (b) *Cooper's Eq. Pl. 337.* (c) *Sugden, 69.*

3. As to the merits, the Chancellor says, that the *allegata* and *probata* do not agree. But the only difference between them is that, in the Bill it is said, the defendant made the bargain, and, according to the proof, his father did; which is no material variance. His answer to the first interrogatory proves, that he assented to his father's agreement, and thereby made

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(a) See *Sugden*,  
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(b) *Sugden*, 73.  
(c) *Ibid.* 63, 66.

(d) See the  
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pany, v. Wy-  
mondsell*, 3 *P.  
Wms.* 143.

(e) *Coop. Eq.  
Pl.* 340.

it his own. The depositions prove clearly that he and his father repeatedly acknowledged *Jackson's* right.

4. The Statute of *Frauds*, (if properly pleaded,) does not affect the case; the contract having been partly performed. Whether the payment of money is *per se* a part performance, is a point much litigated. (a) But *Sugden* says, it is generally understood that payment of a *substantial* sum is part performance. In this case, there were also other acts. The plaintiff procured the Warrant, had the land surveyed, &c. under the contract. Possession of the land, and making improvements, also amount to part performance. (b) So, too, an answer, admitting the agreement takes the case out of the Statute. (c)

5. The Statute of *Limitations* does not apply; for *Cutright*, having obtained a Patent for the whole of the land, was a *trustee* for the plaintiff for part, in consequence of the agreement. Besides, the statute is no bar in cases of *frauds*. (d) Here fraud is charged and proved; for the defendant promised to convey to the plaintiff half the land, but did not, and takes advantage of the Patent. The admission, in the Answer, moreover, takes the case out of the Act. (e)

*Wickham, contra.* The able and learned argument of the Chancellor, forms a part of the Record in this case, and will save me the trouble of a long argument. Mr. *Nicholas's* first objection would be a good one in our behalf, if the Decree were for the *plaintiff*; but the plaintiff cannot take advantage of his own neglect in failing to sue out process, or to take a Decree *nisi* against *Clark*. (1)

2. In *Henderson v. Hudson*, 1 *Munf.* 514, the case was decided on the plea of the Statute of *Frauds*, though put in, by an amendment to the Answer, and after the cause was set for hearing. That nicety of practice, which exists in England, does not prevail in our County Courts. In England, the Answer is taken before Commissioners, who examine the respondent; but such is not the case here. In this country, there must be a reasonable latitude in receiving pleas, even to enable the party to take advantage of points of law. (2) Here the ground for admitting the amendment was the mistake of coun-

(1) Note. See *Harrison v. Brock*, 1 *Munf.* 22.

(2) Note. See *Downman v. Downman's Ex'ors.*, 1 *Wash.* 23.

nel, who gave his opinion that it was unnecessary to *plead* the Statute. This mistake prevented the plea from being filed in the first instance.

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3. The variance between the *allegata* and *probata* in this case was material and important. The plaintiff cannot recover upon proving an agreement, totally different from that relied upon in his Bill.

4. There was no such part performance as would take the case out of the Statute of Frauds. The plaintiff did no more than pay for the Warrant. The Survey was by the Surveyor in his official character. There is no proof that the plaintiff, or any person claiming under him, had *possession* of the land.

5. With respect to the Act of Limitations, I admit that, where fraud has been committed, and *not discovered* by the party defrauded, the Act will not run; but it will from the time when the fraud *was discovered*. In this case, if there was any fraud in refusing to convey the land, it was known to the plaintiff many years ago, and he ought to have filed his Bill when the transaction was recent.

On other grounds, independent of these nice legal objections, the case is clear for the defendant, upon the merits. The agreement to allow *half* the land, for making the entry, paying the Surveyor's fee, and getting out the Patent, was unconscionable. Besides, it is not proved that the plaintiff took out the Patent. The claim, too, (from the circumstances.) was probably either satisfied or abandoned. A Court of Equity will not decree performance of hard or unconscionable agreements, but will leave the plaintiff to his remedy at Law.

*Nicholas* in reply. It is proved that *Cutright* admitted that *Jackson* had paid the money.

Where the Answer of a party is essential to a decision, the Court ought not to decree, even though the plaintiff has neglected to bring that party before the Court. (a)

(a) Key v.  
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The contract was not unreasonable: for land in Harrison County was at that time worth very little. It is said in the Answer, that the tract in question was worth only three hundred dollars. Of the pretended abandonment, there is no proof.

January 20th, 1817, Judge ROANE pronounced the Court's opinion, that there was no error in the Decree, which therefore was affirmed.

### Josiah Legrand *against* the President and Trustees of Hampden Sidney College.

Decided January 21st, 1817.

1. Though private Acts of Assembly may be given in evidence, without being specially pleaded, they are not to be taken notice of, judicially, by the Court, as public Acts are, but must be exhibited, as documents, if not admitted by consent of parties.

THE Appellees exhibited their Bill against the Appellant in Charlotte County Court in Chancery, setting forth, that, on the 9th of January 1807, they agreed with the said *Legrand* to sell him their right to a Tract of Land, lying in the County of Prince Edward on the waters of Appomattox, containing by estimation 912 1-2 acres, for the sum of four thousand dollars, payable in four equal annual instalments, with legal interest from that date; they to give him immediate possession, he to give, *when required*, Bond and Security for the purchase money, and *thereupon* they to make him a Deed in fee, with special warranty, against them and their successors,

2. The Trustees of a College, being incorporated, may sue by their corporate title, without setting out their individual names.


only, and with a particular agreement as to the manner in which the said purchaser should be compensated, by "*re-payment of the Money without Interest, if a better title than that of the College to the said Land, or any part thereof, should thereafter be ESTABLISHED.*" that, in pursuance of this agreement, the defendant was forthwith put into possession,

3. A written agreement for sale of the lands of a Corporation, though not with the common seal affixed, may be enforced in Equity.

which he had ever since held; but, pretending that possibly the title of the complainants might not be good, though at the time of the contract the nature of their title was fully understood by him, and plainly set forth in their written agreement, he refused to give Bond for the purchase money, or to

4. In a written agreement for sale of Land, it was described as a Tract which had *existed* to the Commonwealth, and by the Commonwealth had been given to the Vendor, who stipulated to make compensation, if a better Title than his should thereafter be *established*. The title of the Vendor appearing to be such as described; on a Bill in his behalf for specific performance, the purchaser was not allowed compensation for locating and obtaining a Patent for part of the Land as *waste and unappropriated*, but was decreed to release his claim under the Patent, before the Vendor should be compelled to make him a Deed; and a stipulation, conforming to the agreement, was directed to be inserted in such Deed. \* See *Alexander v. Greenup*, 1 *Munf.* 134—140.

pay the instalments already due. The Complainants therefore prayed a specific execution of the Contract; or, if, on account of the insufficiency of the defendant, the Bond and Security could not be obtained, or the Money when due, that then the Complainants might be permitted to retain the Title to the said Land, and obtain such relief as should be agreeable to equity.

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The defendant demurred generally. The plaintiffs, with leave of the Court, amended their Bill, and set forth, that, at the defendant's request, their agents had furnished him with the muniments of Title, and Charts and copies of Deeds of the Land; he promising to use his endeavours to perfect the title; instead of which, he surreptitiously obtained a Patent from the Commonwealth for part of the Land as waste and unappropriated, under which he sets up a Title of his own against that which he had bought of the College: they pray, therefore, if specific execution of the Contract be denied, that he be decreed to release to them his pretended title derived from the patent, and for general relief.

The written Agreement, exhibited as part of the Bill, bearing date the 9th of January 1807, "between *Charles Scott, Isaac Read, and William M. Watkins*, acting for Hampden Sidney College, by virtue of an order of the President and Trustees thereof, on the one part, and *Josiah Legrand* on the other part," described the Land, as "containing 912 1-2 acres by a late Survey, made about the first of last November, and as part of the Lands formerly possessed by *Robert Rutledge* deceased, and which *escheated* to the Commonwealth, and were afterwards given by the Commonwealth to the said College." The terms of the agreement were in conformity with the description of it in the Bill.

The defendant demurred specially to the amended Bill; 1st, because the names of the President and Trustees were not set out; 2d, because the seal of the College was not affixed to the Contract, nor did it any way appear that the same was the act of the Corporation.

In June 1813, the County Court sustained the demurrers, and dismissed the Bill. The College appealed to the Superior Court of Chancery at Richmond.



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In January 1814, Chancellor TAYLOR reversed the Decree, over ruled the demurrers, retained the cause, and ordered the defendant to answer.

The defendant then filed his answer, admitting the agreement, declaring he had always been ready to execute it with good faith; that the plaintiffs promised to shew him their title-papers, but had never done so; that he had seen only some extracts from some of them, from which he had reason to think the title defective, but thought it unnecessary to state the particulars of his objections, until the papers should be produced. He insisted that, if the title of the Commonwealth to a part of the Land (in consequence of which he had taken measures to obtain a Grant) should be found good, he had a right to a rateable deduction from the price, by the terms and spirit of the Contract. He denied any knowledge of the title at the time of his purchase; averring, that he then believed it good. He now prayed that, before he should be compelled to execute the Contract on his part, the plaintiffs might be obliged to produce their title deeds; that a Survey of the Land be directed, and an inquiry made as to their title to every part. He doubted also their authority to sell according to the agreement, and prayed that such authority be shewn to the satisfaction of the Court.

The plaintiffs (besides the articles of agreement) made exhibits of four Deeds, from different persons to *Robert Rutledge*, dated in the years 1763, 1764 and 1765, for twelve hundred and seventy two acres in all; two Inquests of Escheat, dated May 23d 1794, by which those Lands were found to belong to the Commonwealth, "*except so much thereof, as was sold for public taxes,*" *Robert Rutledge* having died without any heir "*claiming the same;*" and a plat of the Survey, in November 1806, of the Land sold by the College to *Legrand*.

They also proved by the deposition of *Richard N. Venable*, that *Legrand* informed him, that he as well as his son understood surveying, and if the deponent would procure all the information he could on the subject, and put it in his possession, he would make a thorough examination, and communicate to the deponent any discovery he could make, "*and give to the College all the aid that he could;*" "in consequence of this assurance, the deponent obtained extracts from a

"number of conveyances, which he thought related to the subject, also extracts of Deeds for what he supposed to be the adjoining Lands, as far as he could come to the knowledge of them, and delivered them to the said *Legrand*, or his messenger." The deponent believed that no other person, but the said *Legrand* himself, set up a claim, to the said Land, adverse to the College.

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At January Term 1815, the Chancellor decreed, that the defendant pay to the plaintiffs, 4000 dollars, with Interest from January 9th 1807, and Costs; and, on such payment made, and the defendants executing a release to the plaintiffs, in due form of law, of all claim, which he had or might derive from any Patent, which had been or might be obtained by him from the Land Office, for the Tract of Land, in the Bill mentioned, or any part thereof, the plaintiffs should make him a Deed in fee for the Land, with such special Warranty and Covenants as were stipulated in the Articles of Agreement; without prejudice to the *lien* of the plaintiffs on the Land itself for the purchase money; liberty being reserved to them to resort to the Court, in this cause, to enforce the said *lien*.

From this Decree, the defendant, upon his Petition, was allowed an Appeal by a Judge of this Court.

*Wickham for the Appellant.* The Vendor is always bound to shew, that he can make a good title before the Court will decree specific performance. In this case, no Title to the Land is shewn by the College. It is said, that we are bound to shew the defect of the title: but such is not the rule of evidence. If they have a Title, let them shew it. But there is no document in the Record shewing a transfer to the College of that right, which the Commonwealth had to the Land, either, originally, as waste and unappropriated, or subsequently, as escheated. The Commonwealth's original right could not be estopped by any inquest of office, but might still be granted to *Legrand*. Besides, the Inquest itself amounted to nothing; for it is not found by the Jury, that *Rutledge* died without any heir, but merely that he left no heir "*claiming the land*." If, however, the Escheat were valid, the *Commonwealth*, and not the *College*, is entitled under it.

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I understand that an Act of Assembly is relied upon ; but no such Act is inserted in the Record. This Court therefore cannot take notice of it, being a *private* Act. It should appear, too, that the President and Trustees had power to *sell* the Land ; for, if they were only entitled to receive the rents and profits, they could convey no Title.

The Chancellor's Decree is farther erroneous in requiring the Appellant to pay the sum of \$4000, with Interest, *absolutely*, (instead of being upon *condition*, that the plaintiff should make him a Title to the Land in controversy ;) and in compelling him to release his rights under the future Grant in the proceedings mentioned ; which was both unjust and unnecessary. Under the terms of the agreement it was proper, and according to the course of equity, for the Court to direct an inquiry into the title, previous to a Decree for the payment of the Money ; and, instead of decreeing the Purchase Money to be paid absolutely, the regular and legal course of the Court is to decree payment of the Purchase Money *upon the* delivery of a Deed ; so as to make the two acts concurrent.

*Bouldin* for the Appellees. There was a provision in the Contract that the College should make good to *Legrand*, at the rate of twenty-six shillings and three pence halfpenny per acre, any Land, he might *lose* by a defect in their Title. The Records of Prince Edward County Court would have given him all the information he demanded in his answer. He is not an *unwilling* purchaser : he does not come before the Court, praying to be discharged from the Contract on the ground, that he did not understand the defects in the Title at the time of his purchase. I admit that an *unwilling* purchaser will not be compelled to take even a doubtful title : but *Legrand* is willing to hold the *Land*, of which he is in full possession and enjoyment ; but appears only unwilling to *pay the money* !

*Rutledge's* title is unimportant. The College, being entitled under the Act of Assembly, ought not to be bound to trace their Title farther back, than to *Rutledge*, from whom it passed to the Commonwealth by Escheat, and from the Commonwealth to the College. Both parties understood distinctly that they were not to trace it farther back. *Legrand* himself

has no objection to specific performance, but his having himself obtained a Grant for part of the Land as waste and unappropriated.

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The Act for incorporating Hampden Sidney College (a) expressly authorizes the Trustees to sell the College Lands. This power of the Trustees is also recognized in the agreement itself.

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The Court has very correctly decreed, according to the agreement, that a Covenant shall be inserted in the Deed, binding the College to make good any loss, that may be sustained by a better title in other persons. It was therefore just and right to decree, that Legrand should release his claim on the ground of the Location and Grant; because, without such release, that claim might be transferred by him, and enforced by the transferee.

(a) May 1783,  
Ch. 172.

In *Colton v. Wilson*, (b) great stress is laid upon the circumstance, that the purchaser, who wished to get clear of the Contract on the ground of objection to the title, had taken possession of the Land, and was therefore considered as accepting the Title, such as it was. In *Calcraft v. Roebuck*, (c) it is said that every consideration, upon which these agreements are to be executed, must depend on the *bona fides* of the transaction.

(b) 3 P. Wms.  
193.

(c) 1 Vesey Jr.  
224.

*Leigh on the same side.* The Contract was, that if Legrand should be *deprived* of any part of the Land thereafter, he should be *re-imbursed* proportionally by the College; not that he should be entitled to a *deduction* before payment: that such reimbursement should be made upon his being ousted by a better title in *another* person; not that *he* had a right to set up claims in objection to his own Title.

Are there any reasons, set forth in his answer, for questioning the Title? He does not tell us whether he found out defects before he took possession, or since. But, I say, the Title is satisfactorily deduced: and, according to the practise of the Courts of Chancery in this country, it was not necessary to refer it to a Master.

The plain meaning of the Inquests of Escheat must be understood to be that there were *no heirs* of Rutledge. Our law

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provides (a) that private Acts of Assembly may be given in evidence, without pleading them specially. In *Hunter v. Fairfax's* devisee, (b) this Court went on the principle, that they could look into and decide upon a private Act of Assembly, though not part of the Record. (1) The Act of 1794, ch. 37, shews the transfer to the College of the Title from the Commonwealth.

(a) 1 R. C. ch.  
76. sect. 30. p.  
112.

(b) 1 *Munf.* 218.

Objections to the identity of the land are out of the question. *Mr. Wickham* says, that payment of purchase money, and delivery of a Deed from the College ought to be co-temporaneous acts. I should agree to this, were it not for the circumstance, that *Legrand* had obtained a Grant for part of the Land. The Chancellor very properly denied his having a right to do this to the injury of his title, derived from the College. It never could have been understood, that they meant to indemnify him against defects, that he could *make* in the title. A release from him was essentially necessary to enable the College to make him a title.

*Wickham in reply.* Every position that I have taken in argument was taken in the Answer; in which, however, the defendant gives a sufficient reason for not particularly setting out defects in the title: viz., because the title-papers were not before him.

If parties contract under a mistake as to title, will not the Court give relief? Where is the immorality in our *strengthening* our title by getting a Grant from the Commonwealth? Surely we ought to be allowed our trouble and expenses; (2) but the Chancellor has allowed us nothing. The College, being *plaintiffs* in Equity, are clearly bound to do complete equity to the defendant, before the Court will decree specific performance. It was their duty to produce to him their title papers.

The Act for incorporating the College is not inserted in the Record, and therefore cannot be regarded by the Court. I

(1) Note. Judge ROANE observed to *Mr. Leigh*, that, in that case, he considered the Act of Compromise as a letter to the Court, directing Judgment to be entered up; not as a part of the Record, but as a matter *in pays*. *Mr. Leigh* replied, that he believed it would be found, that the point was settled by that case, that a private Act may be relied upon, though not in the Record.

(2) Note. See *Hull v. Cunningham's Executor*, 1 *Munf.* 336 and 338.

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understand the rule to be that private Acts of Assembly may be given in evidence without pleading ; but they must be *given in evidence as facts* : they are not matters of *law*, judicially to be taken notice of by the Court. The doctrine, that the Court is bound to take notice of every private Act, that has been passed since the foundation of the Commonwealth, is fraught with such mischievous consequences, that I cannot think it can obtain. As the Record now stands, I deny that these Acts were given in evidence to the Chancellor. If they were, it should either have been stated in the Decree, or they should have been spread on the Record *in extenso*. This Court cannot receive any new evidence, which was not before the Court below.

Whether *Legrand* got something or nothing by the Grant, the Release was unnecessary. All, that is wanted on his part, is a conveyance, from the College, of *their title*, which, added to his own under the Grant, will make his title complete.

Why was he not to take possession ? He does not seek to disaffirm the contract. This Court has often decided, that taking possession does not preclude the party from getting relief on the ground of defect of title. Such was the case of *Beverly v. Lawson's heirs*, 3 *Munf.* 317.

It appears by one of the Inquisitions of Escheat, that part of the land was sold for *taxes*. For the deficiency, so occasioned, the Appellant ought to be compensated by the Decree. (1)

The counsel for the Appellees afterwards obtained a certificate from Chancellor TAYLOR, in these words : " As to what " passed on the trial of this case, before me, I cannot undertake " to say. But I can state, with great certainty, that the Court " of Chancery never dispensed with any thing, called for by " the pleadings, unless by *consent* of parties. All the counsel " know, and my side-table now exhibits the fact, that many " cases are now resting on it under such circumstances ; and, " I can have no doubt, as the answer in the case puts the au-

(1) Note. This exception was not taken in the Answer ; and indeed appears to be unfounded under the agreement ; for by the Inquests, the land sold for taxes was expressly excepted as *not escheated* ; and, by the agreement, the defendant was to have only such of the lands as were "*escheated*."

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"thority of the Trustees to sell, in issue, but the Act of incor-  
poration was either produced, or the necessity of it was waiv-  
ed by the opposing counsel. I feel so confident of it, that, if  
I were commanded, as the Judge of my Court, to certify a  
more complete record under a *certiorari*, I should have in-  
corporated in it a copy of the charter, as omitted, under the  
head of "*sundry exhibits*."

(Signed)

CREED TAYLOR.

"January Term, 1817."

In consequence of this certificate, and by consent of the parties by counsel, the Court inspected the Act of Assembly of May, 1783, ch. 172, and considered it as a part of the Record.

January 21st, 1817. Judge ROANE pronounced the Court's opinion as follows :

The Court, in consequence of a certificate from the Chancellor, filed among the papers, have inspected the Act of May, 1783, ch. 172, and considers it a part of the Record ; (1) the necessity of a *certiorari* being waived by counsel ; and so considering it, is of opinion that there is no error in the said Decree, which is therefore affirmed.

(1) Note by the Reporter. The Court seems not to have considered it necessary to make the Act of 1794, ch. 37, a part of the Record, because the donation of the escheated lands from the Commonwealth to the College was not put in issue by the Answer, as was the right of the Trustees to sell. Indeed, the fact of that donation might well be considered, under the circumstances of the case, as admitted by the defendant.

January 25th,  
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### Lawrence against Swann and others.

1. *Quare*.  
Whether an Ex-  
ecution can le-  
gally be levied  
on property, the

THE Appellees filed a Bill of Injunction, in the late High Court of Chancery, against the Appellant and *William O. Win-*  
possession of which has passed from the debtor, and remained in a third person, for more than five years, in pursuance of a Deed said to be *fraudulent*, but regularly recorded, and importing on its face to be for valuable consideration ; before such Deed has been impeached and *convicted of fraud* by the Decree of a Court of competent jurisdiction ?

2. Depositions taken in a suit to perpetuate testimony are not to be read as evidence in a subsequent suit, unless it appear that the witnesses are dead, or otherwise out of the power of the Court.

tion, to prevent the sale of certain slaves, on whom an execution, in favour of the said *Winston* against *John Syme*, had been levied by the Appellant, as Deputy Sheriff of Hanover County. The ground of equity relied on was, that the plaintiffs were entitled to those slaves, and had held them in possession more than five years, by virtue of Deeds from *Syme*, duly recorded. The defendants controverted their title, alleging that the deeds in question were *fraudulent*. Many depositions were taken on both sides, and sundry exhibits filed. Chancellor WYTHE perpetuated the Injunction ; from which Decree this appeal was taken.

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The case was argued here, at great length, on the 7th, 8th, 9th, 10th and 12th days of February, 1816 ; but, as the points in dispute were not determined by the Court, the arguments of counsel may with propriety be omitted.

*January, 25th, 1817.* Judge BROOKE pronounced the Court's opinion.

“ The Court, (not intending to decide that an Execution ought not to be served on property, the possession of which has passed from the debtor, and remained in a third person, for more than five years, in pursuance of a Deed, regularly recorded, and importing on its face to be for a valuable consideration, before such Deed has been impeached and convicted of fraud by the Decree of a Court of competent jurisdiction,) is constrained under the circumstances of the case before it, to withhold its opinion, and also its present impressions, on the merits ; as well because *Martha Hoops Syme*, and the administrator *de bonis non* of *Willis Riddick*, whose interests are involved, are not parties to the suit, as because the whole of the case is not fully before the Court. Only one of the deeds to *Warden* is to be found in the Record of the suit of *Syme v. Syme*, referred to in the Answer, of *Sarah Syme* in this suit ; and the object of that controversy being to perpetuate testimony, and it not appearing, in this case, that the witnesses, therein examined, were dead, or otherwise out of the power of the Court of Chancery, the question, whether their depositions (in that event) ought to be read, is not regularly presented to the Court. But for these difficulties, the Court, (though strongly



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inclined to the opinion that it would have been more regular to have impeached the deeds in this case by a suit for that object, than to have levied an execution on the property claimed under them,) might have yielded to the desire of the parties, to put an end to a complicated and expensive suit. The Court, therefore, on these grounds, and because the delay will be not much increased by the institution of a suit, such as before mentioned, in which the party, if so advised, may contest the validity of the title of the Appellees, (as it regards creditors, or others, who may be made defendants to such suit,) not only to the slaves now in question, but to any other property, which may have belonged to *John Syme* the debtor, and which may be claimed by such defendants, so as to put an end to all farther controversy, affirms the Decree of the Chancellor, but without prejudice to any such suit as before mentioned."

Decided January 29th, 1817.

### Bolling against Bolling and others.

1. A Testator, after devising certain lands and other property to his Wife, during her life, directed, "that she should be furnished during her life, out of his whole estate, with what ever provision and necessities of every kind she might have occasion for, to support herself and family, in the same manner he had always lived, or in any other manner she might think proper." Quære, whether, under this devise, she had not a life interest in certain lands, devised to one of his sons, in general terms, without specifying, when that son was to be put into possession? and a right to convert the whole profits thereof to the support of herself and the children generally during her life?

1777, disposed of his property as follows :  
In the first place, he directed his just debts and funeral expenses to be expeditiously and honourably paid by his Executors. Next, he "lent to his loving Wife *Mary*, during her natural life, the land and plantation, on which he then lived, with all his lands adjoining or contiguous thereto, including that, which he purchased of *John Ravenscroft*, his several lots

2. A Devisee is, in general, bound to take notice of the contents of the Will, under which he received, when of full age, certain lands and other property from the Executors; such Will having then been proved and recorded.

3. A Court of Equity ought not to direct an account to be taken, after a great lapse of time, and after acts of acquiescence, by the party demanding it, in a construction of his rights, which, if correct, would render such account unnecessary. \* See *Randolph's Executor v. Randolph's Executors and others*, 1 H. & M. 181.

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" in the towns of Blandford and Petersburg and adjoining there-  
" to, also the rents of his several ware-houses, called Bolling's,  
" Cedar-point, Bolling Brook, Blandford and Davis's, together  
" with the use and profits of one moiety of his water-grist  
" Mill, and of all his slaves, stock of cattle and household  
" furniture on the plantation first mentioned;" adding these  
" words; " *I also direct, that my said Wife shall be furnished,*  
" *during her life, out of my whole estate, with whatever provision*  
" *and necessities of every kind she may have occasion for, to sup-*  
" *port herself and family* IN THE SAME MANNER I HAVE AL-  
" WAYS LIVED, OR IN ANY OTHER MANNER SHE MAY THINK  
" PROPER."

*Item*, he gave to his son *Robert*, his "land and plantation,  
" called *Eaton's*, to be delivered to him so soon as he arrived  
" to the age of twenty-one years, to hold to him and his heirs  
" forever; also his lands at *Squirrel Level*, and that part of  
" his *Namozeen* tract which lies above *Wells's Road*, to him  
" and his heirs forever; also, after the death of his Wife, all  
" his lands, or lots of land, either in or about the Towns of  
" Blandford and Petersburg, also the tract of land, on which the  
" Testator then lived, and all the lands devised to his Wife for  
" life." He directed, that his son should have possession of  
" the forementioned part of " his *Namozeen* tract of land, his  
" *Merchants' Mill*, and one moiety of his *Water Grist Mill* on  
" *Appomattox*, as soon as he arrived at the age of twenty-one  
" years, and should hold the same, and all the other lands de-  
" vised to him and his heirs forever.

" *Item*, he gave to his son *Thomas*, and to his heirs forever,  
" his several tracts of land, called *Hardwick's*, *May's*, *Ed-*  
" *ward's*, and the *Long Ordinary* in the County of *Dinwiddie*,  
" and all his lands on both sides the *Namozeen Creek* in the  
" Counties of *Dinwiddie* and *Amelia*, excepting thereout so  
" much of the said tract, as lies on the upper side of *Wells's*  
" *Road*, which he had before devised to his son *Robert*, called  
" *Otterdam*.

" All the rest and residue of his estate, he gave to his loving  
" Wife *Mary* and his friend *John Tabb*, in trust that, after the  
" payment of his debts and making such provision for his  
" Wife, as she should choose, *in the manner before mentioned, or*  
" *in any other manner, that they, or the survivor of them, should*

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"divide the same among all his children, in such manner and at such time as they, or the survivor of them, should think proper, to hold to them and their heirs forever in severalty.

"Lastly, he appointed his loving Wife *Mary*, and his friend *John Tabb* to be Executrix and Executor; directing, that no part of his estate be appraised, and that his Executors give no security."

When the Will was proved, *John Tabb* alone qualified as Executor: in June 1789, *Mrs. Bolling* qualified as Executrix. At the time of the Testator's death, which event took place on the 24th of February, 1775, his son *Thomas T. Bolling* wanted three days of being twelve years old. He was sent to school and maintained, as were his brother and three sisters, by their Mother, out of the profits of the estate generally, which for the most part was managed by her, and applied, after paying the debts of the Testator, to her and their use, in a prudent and economical manner. *Thomas T. Bolling*, being in a bad state of health, was advised by physicians to visit Europe; in March 1783, he left America, and arrived in France in the course of the succeeding month. His expenses on that occasion, and until he returned, were borne by *Mrs. Bolling*. In October 1785, he returned to America; and, on the 1st of January 1786, was put into possession of *Hardwick's*, *May's*, *Edwards's*, and the *Long Ordinary* in the County of *Dinwiddie*, and a plantation in *Amelia*, called the *Lower Quarter*. At the same time, she delivered to him thirty-nine negroes, some horses, sheep, cattle and hogs, as his share of the personal estate; retaining herself possession of the *Namozeen* lands, devised to him as aforesaid, for the convenience (as she alleged afterwards) of raising the young slaves and maintaining the stock, as she had no other plantation to keep them on; her own home plantation not being equal to it. It was averred by *Thomas T. Bolling*, and from the testimony appeared to be the fact, that, at this time, he had not seen the Will of his father, and took it for granted, that his mother had a life estate in the lands she retained. Having afterwards contracted debts to a considerable amount, part of which consisted of money lent him by her, he, with her consent, offered for sale to other persons a thousand acres, called the *Dogwood Thicket* tract of land, part of the lands

so retained (which in all consisted of seven thousand acres) and at length made the sale to herself at five dollars per acre; one thousand pounds of the purchase money being discounted out of the debts he owed her, and the balance paid him shortly after the contract. In February or March, 1798, he became acquainted with the contents of the Will, and immediately demanded of his mother the whole of the lands in question, except the part she had bought; contending that his right to the whole had accrued at his father's death. On the first of January 1799, she surrendered the possession; but they could not agree as to the compensation, to which he was entitled. Whereupon, he brought two suits in Chancery against her, in the County Court of Dinwiddie; the first, to obtain satisfaction for the use of his lands during the time they were, as he alleged, improperly withheld; the second, to set aside the sale of the Dogwood Thicket Tract, on the ground that he had sold it for less than its value, through ignorance, at the time, of his right to immediate possession. Upon his motion, also, at April Term 1798, the same Court made an order, summoning *Mrs. Bolling* and *John Tabb* to render an account of their Executorship; and, afterwards, an attachment was issued against her, for having failed to do so.

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*Mrs. Bolling* then filed a Bill in the High Court of Chancery, making all the children parties; for an Injunction to stay proceedings on that attachment, as oppressive and unnecessary; and also for a Writ of *certiorari* to remove the several suits aforesaid into that Court; that her rights under the Will of her husband might be declared; that *Thomas T. Bolling* might be decreed to pay her his just proportion of the support of herself and family; that the accounts between them might be adjusted, and the balance due decreed in her favour.

The late Chancellor WYTHE awarded the Injunction, and a Writ of *certiorari*, which was never issued, but the Records from Dinwiddie were certified without it.

Sundry proceedings were then had in the suits; and, on the 6th of October 1803, the Chancellor, "after perusing the Bills "Answers, Exhibits, examinations of witnesses, and report of a "Commissioner with exceptions thereto, and after hearing "Counsel, was of opinion, that the children of the Testator, "*Robert Bolling*, were entitled, so long as they continued

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" members of his family, and also when they were absent from  
 " it for the sake of health, to support, and to the expense of  
 " scholastic erudition in their native Country, out of the estate  
 " lent to his Wife; and to the residue of his estate devised to  
 " Trustees, after payment of his debts and making provision  
 " for his Wife: and that the residue included the reversion of  
 " that moiety of his Water Grist Mill on the River Appomattox,  
 " which was devised to his Wife during her life, and the  
 " profits of those lands, and of the Merchant Mill devised to  
 " Robert the son, whereof he was authorized to take possession,  
 " when he should attain full age, until that time from the Testator's  
 " death, and, also, the slaves not devised to the Wife:  
 " that the conveyance of the land, called Dogwood Thicket,  
 " by the plaintiff to his mother, who both supposed him, who  
 " had a *present* title, to have no more than a *reversion*, was in  
 " equity not binding." He therefore decreed, that the defendant,  
 " Mary M. Bolling, re-convey the said Dogwood Thicket land to the  
 " plaintiff, when he should account with her for so much of the purchase  
 " money, with Interest and the value of the permanent improvements  
 " erected by her upon the land, as exceeded the profits thereof; and  
 " recommitted the accounts, with instructions to the Commissioner,  
 " to state an account of the damages, which the plaintiff sustained,  
 " by dilapidations of the houses, and by destruction of the trees, on his  
 " Namoozeen lands, and by tillage of them during the time of the  
 " defendant, Mary M. Bolling's occupation: to ascertain which  
 " damages, a Jury was directed to be impannelled and charged,  
 " on trial of an issue for that purpose, before the County Court of  
 " Amelia, and their verdict to be certified, &c., to state an account  
 " of the profits of the plaintiff's Namoozeen Mill and lands, and  
 " Long Ordinary in the County of Dinwiddie, before the surrender  
 " of them to the plaintiff; to state an account of the administration  
 " of the Testator's goods, rights and credits; to state an account  
 " of the Testator's Water Grist Mill on Appomattox from the time  
 " of his death, informing who was or were receiver or receivers  
 " thereof; to state an estimate of the hire of the plaintiff's  
 " share of the residuary slaves, while they were labouring for  
 " his mother the defendant; to state an account of the profits  
 " of the Testator's Merchant Mill from the time of his death

"until his son *Robert's* attainment of full age; to state an estimate of the expense of the plaintiff's maintenance and education, if he had remained at home instead of travelling abroad during that interval; to state an account of the daughter *Rebecca's* part of her father's estate; and to state an account of the dealings between the plaintiff and his mother; with any other accounts the parties might require; and report the whole to the Court."

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In pursuance of this Decree, an issue was made up and tried at the Bar of Amelia County Court, and a Verdict certified, assessing the damages sustained by the plaintiff, on account of the dilapidation of the houses on his *Namozeen* estate, to 640*l.* 5*s.* and on account of the clearing and tillage of his lands, to 809*l.* A Report was made by the Commissioner, accompanied with many depositions of witnesses, to which exceptions were filed.

On the 7th of June 1805, in the suit in which *Mrs. Bolling* was plaintiff, the Chancellor, "unable to determine which of the parties, or how much either of them, was indebted to the other," decreed that the plaintiff "seal and deliver to the defendant, *Thomas T. Bolling*, a release of all her demands against him, and deliver to him all mortgages, bonds and other securities for payment of money due and supposed to be due from him to her." In the suits in which *Thomas T. Bolling* was plaintiff, the Chancellor decreed, that the sale of the *Dogwood Thicket Tract* of land be set aside, but that the Bills of the plaintiff, as to every thing else by them sought, be dismissed.

From these decrees, both parties appealed.

January 29th 1817, Judge *Roane* pronounced the Court's opinion.

The Court, not deciding, *absolutely*, that the Appellant *Mary M. Bolling* had a life interest in the estates devised to the Appellee *Thomas T. Bolling*, under the Will of her husband *Robert Bolling*, nor that she had a *strict* right, under the same, to convert the whole profits of those estates to the support of herself and the children of the said Testator, although such are the present impressions of the Court, is of opinion that, after the great length of time which elapsed from the

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death of the said Testator and the probate of his Will, before the institution of the suit by the said Appellee, claiming those estates; and after all parties had apparently acquiesced in this construction thereof; and after the said Appellee *Thomas T. Bolling* himself had not only so acquiesced, but had, in effect, assented thereto and ratified the same, by receiving from the Appellant *Mary M. Bolling*, in the year 1786, the Estates, she then delivered to him, without then making known this claim, or setting up a contrary construction; and, considering that, not only the acts of assent and acquiescence aforesaid had a tendency to lull the Appellant *Mary M. Bolling* into a belief that her claim thereto would not be objected to, but that, also, the great lapse of time aforesaid may have, from the death of Witnesses, loss of Documents, and other causes, rendered the taking the account, required by the said Appellee *Thomas T. Bolling*, on any principles of certainty or justice, impossible, the Court is farther of opinion, that, under these circumstances, the construction aforesaid ought not to be disturbed, even if it were in strictness erroneous, nor the account, required as aforesaid, be taken. As to the pretension of the Appellee *Thomas T. Bolling*, that he only came to the knowledge of his rights under the Will aforesaid in or about the year 1793, the Court is of opinion, that, if he were even correct as to the extent of those rights, he should not be permitted to avail himself of the benefit of that alleged ignorance, nor be permitted to rely on it, under all the circumstances of this case, and, especially, as the Will under which he professes to claim had been long of record.

This view of the case makes it unnecessary, in the opinion of the Court, if, under other circumstances, it would have been required, that the representatives of *John Tabb*, or any others, should have been made parties.

The Court has the less difficulty in coming to this conclusion, because the Appellant *Mary M. Bolling* surrendered, to the use of her husband's estate, and the benefit of his children, a considerable sum then due to her from the estate of her father; because she made no claim of a distributive share of the estate of her deceased daughter *Rebecca Bolling*; because she had relinquished, to the Appellee *Thomas T. Bolling*, considerable sums, due from him to her, as Interest;

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because she had delivered up to him, on his coming of age, his full proportion of the residuary Slaves of the said Testator; because she furnished him, without account, with considerable sums, for his support and education, in Europe, more, probably, than she was bound to supply under his father's Will; and because she extended to him various other acts of liberality, all of which she would probably not have done, but in confidence that her construction of the Will aforesaid would not have been disturbed.

The Court is farther of opinion that the sale of the Dogwood Thicket Tract of Land ought not to have been impeached; first, because, if the Appellant *Mary M. Bolling* had an Interest during her life therein, as this Court rather at present supposes, the foundation of the alleged ignorance of the Appellee *Thomas T. Bolling* of his present right thereto is removed; and, secondly, because, if she had no right thereto under her husband's Will, yet it appears that she permitted him to offer to sell the fee simple Title thereof to others, thereby waving her claim aforesaid thereto, and finally not only gave him the fee simple price of this Land for the same, but more, probably, than he could have obtained from others.

The Court is therefore of opinion, and accordingly decrees, that the Decree in the suit claiming to set aside the sale of the Dogwood Thicket Tract of Land should be reversed with Costs, and the Bill dismissed; that the Decree dismissing the Bill of the Appellant *Thomas T. Bolling* against the Appellee *Mary M. Bolling* should be affirmed; and that the Decree in the suit of the Appellant *Mary M. Bolling* against the Appellee *Thomas T. Bolling* should be reversed with Costs, and that she should be decreed to recover against him, or his representative, the amount of his Bonds given to her, and not delivered up or paid as part of the purchase of the Dogwood Tract of Land, but without Interest thereupon during her life; the said *Mary M. Bolling* being proved to have admitted, that she had no other demand against the said *Thomas T. Bolling*, than the Bonds aforesaid, without Interest during her life time as aforesaid. And the said last mentioned suit is remanded to the Court of Chancery, to be finally proceeded in pursuant to the principles of this Decree.





“ command it, or as much as I can command, and the next  
 “ instalment twelve months after, and so on annually until  
 “ the whole is paid. P. L.”

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Before any survey was made in pursuance of this agreement *Hundley* received the first thousand dollars in part of the purchase money, and, (as he alleged in his answer) put *Lyons* in possession of the Land, except the one hundred acres in which his mother had a life estate: but it appeared that, part of the Tract being leased to a certain *George Toombs*, *Hundley* continued to receive the Rent from that Tenant for several years; and, after his mother's death, (which happened in 1809,) he occupied and applied to his own use, the profits of the said hundred acres, for which, in the same Answer, he said he was willing to account. In the year 1808, a survey of the Lands, collectively, was made, shewing an excess in quantity of *fifty-four* acres; whereupon, it appeared that a misunderstanding had existed between the parties, in relation to the meaning of the agreement; *Lyons* contending that he was *not* bound to pay for such excess; but *Hundley* insisting that he *was*. The Conveyance was therefore not executed, and no farther payment was made of the Purchase Money.

In the year 1809, Judge *Lyons* died; having, by his last Will devised the Lands in question to the plaintiff for life, with remainder to his son *Peter Lyons* in fee. After his death, (an attempt to settle the controversy by a compromise having proved abortive,) the suit was brought as aforesaid; in the progress of which, from the Bill, Answer, Depositions and Exhibits, the foregoing appeared to be the material circumstances of the case. An Order of Survey was made and executed, the result of which shewed an excess, in the quantity, of fifty six acres and three roods.

At January Term, 1814, Chancellor TAYLOR, “ being of  
 “ opinion that, as the contracting parties seem to have entered  
 “ into the agreement, in the Bill mentioned, *without contem-*  
 “ *plating any excess* of Land at the time, the plaintiff claiming  
 “ under *Peter Lyons* deceased should, upon general principles,  
 “ be accountable for such excess at the *average value* of the  
 “ whole Tract; that, under the general rule of equity, the de-  
 “ fendant is *not* accountable in this case for *profits*, nor entitled

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"to interest, (1) but from the time he shall execute and deliver to the plaintiff a proper Deed of conveyance, with general warranty, for the Land in the Bill mentioned;" therefore decreed, "that the defendant do forthwith execute such a Deed to the plaintiff, (with remainder to *Peter Lyons*, his infant son and his heirs, agreeably to the last Will and Testament of the Hon. *Peter Lyons* deceased;) and that the plaintiff (who, being in Court in his proper person, consented thereto,) do thereupon execute to the defendant three Bonds, with security, for one thousand dollars each, payable in three annual instalments, to commence from the delivery of the said Deed, and also pay to the said defendant the sum of four hundred and twenty-three dollars and forty-nine cents, being the average value of fifty-six acres and three roods, the excess of Land as aforesaid; that an account be stated by a Commissioner between the plaintiff and the defendant, *charging the former* with any profits derived either by his father or himself from any part of the Land in question, and *crediting him for the Interest* of the one thousand dollars, from the time the same was paid, to the time the said Deed may be delivered; stating such matters specially as he may think pertinent, or as the parties may require to be so stated."

At January Term, 1815, the defendant deposited with the Clerk of the Court a Deed, in execution of the above Decree; which was filed among the papers. In June 1815, the cause came on to be farther heard, upon the papers formerly read and the Report of a Commissioner; whereupon, the Chancellor decreed that the defendant pay to the plaintiff the sum of three hundred dollars and twenty-one cents, (a balance stated by the Commissioner as due to the plaintiff upon the account,) and the Costs; and that the plaintiff do appear, on a given day, to shew cause why an Attachment should not be sued forth against him for his contempt in failing to execute the Bonds to the defendant as before directed.

From this Decree the defendant appealed.

*Wickham* for the Appellant.

*Nicholas* for the Appellee.

(1) Note. The plaintiff contended for profits of the Land; the defendant for interest on the Purchase Money, which claim the plaintiff opposed.

January 30th, 1817, Judge ROANE pronounced the Court's opinion.

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The Court is of opinion that, as it does not clearly appear, from any final and conclusive agreement, between the Appellant and the Testator *Peter Lyons*, among the proceedings, that it was the intencion of the said parties to buy and sell the Land, the subject of the present controversy, by the *tract*, and not by the *acre*, there is no error in so much of the Decree before us, as holds the representatives of the said *Peter Lyons* responsible for the average value of the surplus Land, found to be contained in the Tract.

The Court is farther of opinion that, as the Appellee has gone into a Court of Equity for a *specific* performance of the Contract, which was probably only delayed from the misunderstanding of the parties and other causes, that Contract should have been decreed to have been executed *in specie*, by causing the Appellant to make a Deed for the whole Land to the Appellee for his life, with remainder to his son *Peter Lyons* in fee, on his receiving from the Appellee, or from the proper representatives of the said *Peter Lyons*, (who for that purpose ought, if necessary, to have been made parties,) the sums yet remaining due under the Contract, including, as part thereof, the average amount of the surplus Land aforesaid, with Interest, from the expiration of eighteen months from the date of the Contract, upon one third part thereof; with Interest, on another third, from the expiration of twelve months thereafter; and Interest, on the remaining third, from the expiration of twelve months from the said last mentioned day; and reserving to the Appellant a *lien* on the said Land, to secure the payment thereof, if necessary; and that the Appellant on his part should have been decreed to pay the profits of the said Land, after the date of the Contract, whether derived from his own occupancy thereof, or received by him from others, and including the part held by his mother, after the period of her death; and that the Appellee should have had liberty reserved to him to use the name of the Appellant, if necessary, to recover any sums due from *George Toombs* for the use of a part of the Land aforesaid.

The Court is therefore of opinion, and accordingly decrees, that so much of the said Decree, as is hereby approved be af-

firm; and that so much, as conflicts herewith be reversed with Costs; and the cause is remanded to the Court of Chancery to be finally proceeded in pursuant to the principles of this Decree.

January 31st,  
1817.

### Moore against Gilliam.

1. A plaintiff IN an action of Ejectment in the Superior Court of Hano-  
in Ejectment ver County, in behalf of *Walter B. Gilliam*, against *Anne*  
may recover *Moore*, the Jury returned a special verdict, finding that *John*  
against a widow *Gilliam*, father of the Lessor of the plaintiff, was in possession  
holding posses- *Moore*, the Jury returned a special verdict, finding that *John*  
sion of the land, *Gilliam*, father of the Lessor of the plaintiff, was in possession  
(of which her of the land in controversy, in the summer of 1784, and con-  
husband died seised,) and tinued in possession 'till 1801, 'till he died, having, by his Will,  
seised,) and having a right duly recorded, and found in *hac verba*, devised the same to  
of Dower, if it do not appear him; that Mrs. *Gilliam*, wife of *John Gilliam* aforesaid, died  
that the land in controversy, was before her husband; that the Lessor of the plaintiff was in  
assigned her as possession from the death of his father, and continued in pos-  
her Dower, or session 'till the 10th day of October, 1804, when he conveyed  
as part thereof, the said land by Deed of bargain and sale, to *John Spotswood*  
or was attached to the *manion* *Moore*, which Deed was duly recorded, and was found in *hac*  
house of her *verba*; that on the said 10th day of October, 1804, the said  
husband at the time of his death.  
death.

*John Spotswood Moore* conveyed by Deed of bargain and sale,  
2. Where a the said land to *Meriwether Jones*, *Reuben M. Gilliam* and *Skel-*  
Deed is made to *ton M. Gilliam*, as Trustees, to secure the payment of the pur-  
the purchaser of chase money to the said *Walter B. Gilliam*; which Deed was  
land in fee sim- chase money to the said *Walter B. Gilliam*; which Deed was  
ple, and on the found in *hac verba*; that, the purchase money not having been  
same day, he, without being  
without being joined by his  
wife, executed a Deed of Trust to secure the payment of the purchase money; to raise which,  
the land is afterwards sold; *quære* whether, if she survive him, she be entitled to any right of  
Dower in such land?

3. *It seems*, that the testimony of the Editor of a Newspaper, that he inserted therein, the requisite number of times, an advertisement, the purport of which he states on oath, is sufficient proof of such publication, on a trial in Ejectment, without producing the advertisement itself.

4. If it be proved on a trial in Ejectment, that the father of the lessor of the plaintiff, who devised the land to him, was in possession thereof many years before and until his death; and that the lessor of the plaintiff afterwards conveyed it to a person, who was in possession at the time of his death; the Jury may presume that the lessor of the plaintiff was in possession from the death of his father to the date of such conveyance, if it be not proved that some other person, in the mean time, had that possession.

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wholly paid, one of the Trustees, in conformity with, and in pursuance of the directions of the said Deed of Trust, advertised and sold the said tract of land; that the Lessor of the plaintiff became the purchaser thereof; and that the said Trustee conveyed the same to him by Deed, bearing date the 10th of February, 1810, which was duly recorded, and found *in hac verba*; that *John S. Moore* died in February, 1810, in possession of the said land; that the defendant was his widow, and in possession of the same at the time of finding the verdict; and that she was his wife at the time of the execution of the Deed aforesaid, from *Walter B. Gilliam* to him, dated October 10th, 1804.

At the trial of the cause, the plaintiff introduced the affidavit of *Thomas Ritchie*, Editor and Printer of a paper called the *Enquirer*, printed in *Richmond*, stating that an Advertisement was inserted by him in that paper, from the 3d of June to the 17th of July, 1807, both inclusive, offering for sale on the 20th of July, 1807, at the Eagle Tavern, in the said city, for ready money, a tract of land, described as lying partly in *Hanover*, and partly in *Goochland*, adjoining the lands of *Elisha Leake*, *Samuel Mosby*, *William Woodson* and others, and so offered for sale, as was stated in said Advertisement, in pursuance of a Deed of Trust from *John S. Moore* to secure a debt due to *Walter B. Gilliam*. The defendant, having waived all exceptions to the formality of taking said affidavit, and agreed that it should have the same effect, as if the said *Ritchie* were personally in Court on oath, objected to the same on the ground that it was not competent to prove the facts therein stated, in the absence of the Advertisement itself, therein referred to; the Advertisement not being produced: but the Court decided that the said evidence was proper to go to the Jury, in proof of the facts therein stated; to which opinion of the Court, the defendant excepted.

The plaintiff, also, having proved that *John Gilliam*, the father of the Lessor of the plaintiff, was in possession of the land from the year 1784, or 1785, to the time of his death in the year 1801; that he devised it by his Will to his wife for life, with remainder in fee to the Lessor of the plaintiff; that his wife died in his life time; and that the Lessor of the plaintiff conveyed the said land to *John S. Moore* in October, 1804,

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who was in possession, till his death; the Court instructed the Jury, that they might presume that *Walter B. Gilliam*, the Devissee, was actually in possession of the land in controversy, at the death of the Testator, *John Gilliam*, and continued in possession until the conveyance by him, unless it were proved that some other person was, in the mean time, in possession of the said land. To this Instruction, the defendant also excepted.

Upon the special verdict, judgment was given for the plaintiff; from which the defendant appealed.

The counsel for the *Appellant* being absent, the cause was argued here by *John Robertson* for the *Appellee*, who contended that, according to the case of *Chapman v. Armistead*, 4th Munf. 383, if *Mrs. Moore* had a right of Dower in the land, the plaintiff in Ejectment was nevertheless entitled to recover; because it does not appear by the verdict, that her dower had been assigned her in the land in controversy, or that she resided thereon under the Act of Assembly, which authorizes the widow "to remain in the mansion house and the messuage or

(a) 1 R. C. ch.  
94. § 2, p. 170.

"plantation thereto belonging." (a) But, in fact, *Mrs. Moore* had no right to be endowed of this land at all; for, on the same day that the Deed was made to her husband, he conveyed it by the Deed of Trust, to secure the payment of the purchase money. The land, therefore, was merely *in transitu*, (b) and never rested in the husband. *Eo instanti*, that the title passed to him, it passed from him to the Trustees.

(b) 2 Bl. Com.  
132.

January 30th, 1817, Judge ROANE pronounced the Court's opinion, as follows:

"It does not appear from the special verdict in this case, that the tract of land, the subject of controversy, was the one attached to the mansion house of the Appellant's husband at the time of his death, whereby she might have claimed to be entitled to the possession thereof, until her Dower in her husband's lands should be assigned to her.

"Thus considering that verdict, and being consequently of opinion that her right of Dower does not come in question in this cause, the Court passes no opinion thereupon, and affirms the Judgment."

# Harrison Dance's Case.

January 27th,  
1817.

BY an Act of the General Assembly, passed the 19th of February, 1816, entitled, "An Act concerning the General Court, and for other purposes," the Clerks of the several Chancery District Courts, directed by law to be holden at Richmond, Williamsburg and Staunton, and the Clerks of the Court of Appeals and General Court were required, on or before the 1st of November ensuing, severally to enter into bond with sufficient security to be approved of by the Court, of which each was Clerk respectively, in the penalty of ten thousand dollars, payable to the Governor for the time being, and his successors, and conditioned for the faithful performance of the duties of his office.

Before the said first day of November, 1816, *Harrison Dance* Clerk of this Court obtained the leave of the Court to shew cause against his being compelled to give such bond, the time to shew which cause was extended until the 27th of January, 1817.

The case was argued by *Wirt, Leigh and Wickham*, for the Clerk; and by *Philip N. Nicholas*, Attorney General, against him.

The Reporter was not present at this discussion; but has been favoured by Mr. *Nicholas* with his notes, containing his own argument, and many of the positions taken on the other side; from which, the following observations are extracted.

The question in this case arises under the Act of February 19th, 1816, Acts of 1815-16, p. 60, which expressly requires the Clerks to give bond. That this is a salutary regulation all must admit. The motives are explained in the third section. If, then, the will of the Legislature be plainly as well as wisely expressed, let us inquire why it should not be carried into effect? And this will lead me to inquire into the different grounds of defence set up by the defendant's Counsel.

The first ground is an alleged incapacity in the Legislature to pass any law requiring the Clerk of the Court of Appeals to give bond; because, it is said the Clerk is a constitutional officer.

1. The Clerk of this Court being required, by an Act of Assembly enacted since he came into office, to give bond and security for performance of his official duty; the Court considered it not proper to dispense with, or sanction the non-execution of such Bond, or to pronounce any opinion as to the consequences of his failing to do so; but left it to him to execute the same, or not, at his own peril, to be adjudged of, in case of failure, by a Court having competent jurisdiction of the case.

2. *Quare*, whether the Clerks of the Chancery District Courts of Richmond, Williamsburg and Staunton, and the Clerks of the Court of Appeals and General Court, were constitutionally bound to give bond and security, for performance of their official duties; being required to do so by an Act of Assembly enacted after they came into office?



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1817.

Dance's Case.

I deny that he is a *constitutional* officer. But if he was, the most that could correctly be contended for would be, that the Legislature could not change the *tenure* of his office : that is, it could not make him removable *at will* : but, nevertheless, it might require him to perform *new duties*. It is true that, in the assignment of such duties to a constitutional officer, holding during good behaviour, the Legislature cannot with propriety assign duties, which are *oppressive*, or incompatible with the nature of his office. Otherwise, it might by a side wind destroy his independence. One of the first Acts passed under the Federal government, assigned to the Judges the task of taking evidence concerning invalid pensioners : this was deemed incompatible with the duties of their office, and repealed. So, if the Legislature of either government were to assign incompatible and oppressive duties to constitutional officers, holding during good behaviour, it would be unconstitutional, and would be resisted with propriety.

But it would seem that the duty now required of these Clerks is *not unreasonable* ~~or~~ *oppressive*, nor inconsistent with their office, but essential to the public good. If, then, the Clerk be a constitutional officer, yet the Legislature might assign him this duty.

But he is *not* a *constitutional* officer. His appointment was under the Act of Assembly ; 1 R. C. ch. 62. § 11. 12. p. 62. It is said that the 15th section of the Constitution, (1 R. C. p. 6.) embraces the case. This, I contend, is an erroneous construction of that section. In the first clause alluding to Clerks, *County Court Clerks* alone are mentioned : in the second, the words "*the Clerks*" plainly refer to those, spoken of before. It is to be recollected, that, at that time, there were no Clerks appointed by the Secretary, but the County Court Clerks. The Secretary and those Clerks were parts of one system. Hence they are mentioned in one clause, as existing officers.

The next mention of Clerks in that section is "*The present and future Clerks,*" &c. Now, if the provision had meant to include *all Clerks*, for all *Courts* thereafter to be established, would it not have been introduced with more formality and precision ? Would it have occurred in the midst of a clause relating to distinct subjects ? The words "*present and future Clerks*" referred to Clerks already spoken of : "*present*" cer-

tainly meant the County Court Clerks; and "*future*," so nearly coupled with it, meant Clerks of the same kind and provided for *successors*, or Clerks of *new Counties*. One reason for this preference to County Court Clerks was, that, in the time of the Revolution, it was an object to conciliate existing officers, who were probably influential. The provision concerning the Militia officers was founded on a similar principle. Besides, the County Court Clerks might have been considered, as having strong claims on the public: the then incumbents were raised in the Secretary's office, and had devoted their lives to those employments; and it was thought unjust to disturb them. And having extended the privilege of holding their offices during good behaviour to one class of those Clerks, the framers of the Constitution deemed it proper to extend it to the *future* Clerks of the same description. As to future Clerks of Courts, yet to be created, there being no pretence of vested rights in their favour, the provision concerning them was confided to the Legislature.

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*Dance's Case.*

There is another rule of construction: that general phrases shall not include higher and different classes from those enumerated.<sup>(a)</sup>

(a) 1 Tuck. Bl.  
87.

Again; to suppose it was intended to include the Clerks of all Courts would be to violate the arrangement of the Constitution. It will be found that the different sections are generally employed about different parts of the system, which relate to the same subject, and exhaust it. This provision, had it meant to embrace Clerks of Superior Courts, would have been in the 14th section. The 15th is on the subject of the County Courts, and officers immediately connected therewith. The practical construction, given this clause (as appears by the marginal note annexed) has been, from the time of forming the Constitution up to the present day, to confine it to the *County Court Clerks*. But what seems conclusive, is that, if this extends to *all* Clerks, then *vacancies*, and not original appointments are provided for: which could not have been intended.

But it is contended that my construction is too narrow: that the policy of giving the tenure of office during good behaviour to one Clerk extended to all:

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I have attempted to shew that their situations were different; and I may return the argument that it was only a limited number of officers who were to hold during good behaviour. There is no such provision as to Justices of the Peace, Sheriffs, Coroners, and a variety of others.

But "it was the policy of the English laws to place these officers on that footing;" and *Harcourt v. Fox*, (*Show. Parl. cases* 158, and *Ld. Raym.* 161.,) is referred to.

I admit, it is stated, to be good policy to allow a permanent tenure to officers concerned in the administration of justice: but the case of *Harcourt v. Fox* proves, that they are always subject to the control of Parliament. In England, the tenure of the office of Clerk of the Peace was actually taken away, and made to depend on the office of *Custos Rotulorum* by *Stat. 37. Hen. 3.* This model, if in view, was exactly opposite to that contended for. Nor is it, within any grounds of policy, ever contended that it was necessary to put Clerks out of the power of the Legislature.

An argument is derivable from the omission in the Act of Assembly concerning *County Court Clerks*, (1 R. C. 94.) to mention their tenure of office, and the careful specification of such tenure in the several Acts respecting the Clerks of the Superior Courts; as shewing, that the Legislature considered the former, and not the latter, provided for by the Constitution. The first Court of Appeals law, (*Ch. Rev.* 102,) said that the Clerk should "be removable for misbehaviour" without the words, "*in the manner directed by the Constitution,*" which are found in 1st Rev. Code, ch. 63. § 11. Therefore, if there was anything in the argument, founded on those words, it does not apply. But the argument is not sound. For the argument is that the Constitution does not point out the manner of removal, but only the tenure; and that the reference to that instrument recognizes the tenure as constitutional: but the law says the *manner is pointed out*; and, therefore, all that is meant is, that the Clerk shall hold during good behaviour, and that he may be prosecuted in the *General Court*.

It appears to me to be proved by this view of the Constitution, that the Clerk of the Court of Appeals is an officer deriving his existence and tenure merely from the *Legislature*. This opinion was in effect declared in *Henings* case, by all the

Judges of the General Court who were present, except one. The opinion of that Court is entitled to great weight on the present occasion; because they are the highest Judges in criminal matters; and because, under the Constitution, their's is the jurisdiction of this very case.

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If the Clerk is not a *constitutional* but a *legal* officer; the Legislature may annex new duties to his office; and, 2dly, may alter its tenure. This power is exercised in England constantly, as to such office, as the case of *Harcourt v. Fox* proves.

But it is said to be contrary to the principles of our government to disturb *vested* rights; and that a right to the office of Clerk is just like a right to land, &c.

This I deny. Every office, which is not secured in its tenure by the Constitution, can be altered, modified or abolished, either in whole or in part, at the will of the Legislature. This results from the general Legislative powers conferred by the State Constitution; and from the necessity of introducing express limitations as to certain officers, such as Judges, &c. held necessary even in the Government of the United States, which is limited to certain express or enumerated powers.

But "the office of Clerk is as much his *as his land*: it is his "*freehold*."

This position is contrary to the spirit of our government. I do not contend for the right of the Legislature to take away private property; except in certain cases of public necessity, such as Roads, Canals, &c. in which it has always been exercised. The first section of the Bill of Rights declares the right to acquire and possess *property*: but that means *private* property, as is proved by the second section. *No man* can have a *private property* in a *public office* in this *Commonwealth*. So long as he is in office, he has a private property in the *profits*, but not in the *office*.

In the case of the Inferior Judges of the United States, though Judges hold during good behaviour, yet Congress abolished their offices. The present pretension set up for the Clerks claims a higher privilege for a Clerk, a mere *legal*, not *constitutional*, officer.

But Mr. *Wirt* contends, 1st, That an office during good behaviour is a freehold; and he quotes many cases to prove it.

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It is true, that, while the office continues unchanged, the party is considered, in *England*, as holding as a freeholder. Our Bill of Rights declares that public officers are "*trustees and servants*." The similarity would therefore seem to fail, and the common law doctrine to be inapplicable here. But, suppose the English doctrine to be applicable: we ought not to go farther, than that doctrine, and contend, that the Legislature cannot control these officers.

Next, it is said, that an officer, holding during good behaviour, must be convicted of *ill-behaviour*, strictly, in *his office*; and cases are quoted. If this doctrine were important in the present case, it would require a thorough investigation before we would come to the conclusion that an officer, who was guilty of treason or felony, should be suffered to continue in office, and pollute a Court of Justice by his presence, without a possibility of his removal: but I hold it unnecessary. The cases, which are quoted to prove the doctrine, all contain evidence of the Legislative power to change, abolish and modify offices; a complete power to add to their duties, or change their tenures. Nothing can establish a contrary doctrine, but proving, what it is morally impossible to prove, that a man's office is *as much his property, as his horse, or even his slave*.

But Mr. *Wirt* and Mr. *Leigh* contend that to require a bond would be to annex a new, unprescribed and arbitrary condition. As to its novelty, and its being unprescribed, the answer is, that he took it, knowing that the Legislature had a right to modify; and every man, who enters into office, accepts it on the understood principles of the Government. As to its being arbitrary, what is required is nothing more, than that he shall secure the performance of his duty.

It appears to me to result from the foregoing considerations; 1st, That the Clerk of the Court of Appeals is a mere *Legislative*, not *Constitutional* officer; 2d, That the Legislature may either abolish the office, add new duties to it, or change its tenure, or declare by law that all existing officers of that class, shall, by a particular day, give a new caution to the public, or, for that omission, forfeit their office.

It remains for us to inquire then, if the Legislature have the power to do these things, what have they done by the Act of last session?

But, first, I would answer a remark of the Counsel on the other side, on the Act of 1813-14, which divided the Chancery Districts of Williamsburg and Richmond. A question arose, under the third section of that Act, whether the Clerks, *then in office* at Richmond and Williamsburg, were bound to give bond; and it was decided that they were not bound. But I draw a difference from the passage of the Act of February 19th, 1816, and consider it proof of the solicitude of the Assembly to compel the Clerks to give bonds.

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The proviso of the second section of the last mentioned Act proves, that the Legislature partook of the doubts, whether these Clerks should not give bonds under the former Act. That section is express that they *shall give bond*. Where words are plain, there is no room for *construction*.

Two reasons, however, are assigned for not construing the law according to its words: 1st, That the proviso shews it was only meant that *future* Clerks should forfeit. I contend it was meant to extend the forfeiture to *present* Clerks; because, upon common law principles, a man forfeits his office, by omitting to do what the law expressly or impliedly enjoins him to do; and because, if he holds during good behaviour, the violation of a duty, prescribed by Statute, is a breach of good behaviour. If this proviso were directly repugnant to the purview of the Statute, it would be void.<sup>(a)</sup> But it is in fact not contradictory; it is only making more explicit what was before declared, as to existing Clerks. The proviso might well stand with the other section.

(a) 1 Co. Rep.  
47. Plond. 564.

It is a rule for construing Statutes that "a Statute ought, upon the whole, to be so construed, that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant." The construction given on the other side has the opposite effect.

But it is contended that this clause is nugatory; because no sanction is annexed to it. A sanction results from the principles of the common law; for, "when a Statute commands or prohibits a thing of public concern, the person, guilty of disobedience to the Statute, besides being answerable in an action to the party injured, is likewise liable to be *indicted* for

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(a) 6 Bac. 393,  
Title STATUTE,  
Letter K., quot-  
ing Cro. Elis.  
635; Croucher's  
case. 2 Inst. 131.  
163. 1 Hawk.  
c. 22. § 5.  
(b) Common-  
wealth v. Alex-  
ander, 4 H. and  
M. 522.

"the disobedience;" (a) and a person, convicted on an indictment for breach of official duty, is removable from office. (b)

It is farther contended that, even if this be a cause of forfeiture, this Court cannot remove the Clerk. This will de-

pend on the construction of the case of *Dero v. Stribbling*, 3

H. and M. 1. In that case the Judges were of opinion that

the Clerk was Clerk by his Commission; and it is inferible,

from the course of the decision, that, if he did not give bond,

the Judges might appoint another. Judge FLEMING says so in

terms.

If the Court consider that the omitting to give bond amounts to a forfeiture, triable by Indictment, then still, as their attention has been judicially called to the subject, they should make an order, directing the Clerk to give bond, or intimating their readiness to receive it; that the fact of non-compliance may result from the Clerk's own omission. But if the Court should think that the law is defective, and does not reach the case, then it would omit to act. Its opinion on the case would be highly important in every view, as it would regulate the other Courts.

January 27th, 1817. The Judges pronounced their opinions *seriatim*.

Judge COALTER. The Act of Assembly, passed the 19th of February 1816, requiring the Clerk of this Court, with others, to give Bond and Security for the faithful performance of the duties of their offices, being devised by the Legislature for the greater security of suitors, is one, which as far, as depends on me, I am willing to execute; that is to say, to judge of the securities, who may be offered; to see to the execution and recording of such Bond; and to the recording of any other Bonds, which may be sent into this Court for that purpose.

I am unwilling, however, to lay the Clerk under a Rule to give such Bond, or to express any opinion as to the obligations, which the law imposes on him to do so, or as to what may be the consequences to him should he fail to comply with its requisitions. Could I be satisfied that this Court were the Judges in the last resort of this question; that we could declare the law, as well as fix its sanction, and carry it into effect, I should not hesitate to enter upon the subject, concern-

ing which, however, I have not formed, nor do I mean in the slightest degree to intimate an opinion. But, when I consider, that not this Court, but another is finally to try and judge of the case, I am unwilling, by any opinion of mine, to mislead the party, either into the surrender of his rights on the one hand, or to lay himself obnoxious to a penalty on the other; must therefore leave him to act at his peril, making known my willingness to receive the Bond, should it be offered.

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Could I believe the Act authorized me, in this case, to declare that the execution of Bond and Security, as required by it, was a condition, upon the non-performance of which the estate of the Clerk in his office must cease and determine, in the same manner, as that of a Clerk appointed since the Act, I should have no hesitation in giving an opinion whether the Law was obligatory on the Clerk or not; and, if I thought it was, I would, on his failure, declare the office vacant, and proceed to make a new appointment. The failure of a Clerk, *newly appointed*, to give Bond, I apprehend, would not be considered a *misbehaviour in office*, for which he must be indicted and removed by the General Court, he holding his office until such removal; but would at once, be held *here*, as the non-performance of a condition, without doing which, he was not completely Clerk, although he might hold a Commission from the Judges of this Court, or their appointment of Record. Every thing cannot be done at the same moment; and he must be appointed before he can either take the Oath or give Bond.

In this case though, I understand that no Judge is prepared to say, that, on the failure of the Clerk to give Bond, *we* can, without farther trial, declare the office vacant, and proceed to a new appointment.

If the Bond is not given, and that failure does not, *ipso facto*, vacate his office, so that this Court can appoint a new Clerk, the party may, nevertheless, by disobeying the law, be guilty of an offence, either in his private character, or in *his office of Clerk*, punishable before a competent tribunal; or, if he is correct in the grounds, which he has taken in shewing cause in this case, he may be altogether innocent; but it



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is not for me to say whether he ought to be acquitted or found guilty, or what ought to be his punishment.

A rule on the Clerk to give Bond would not, as I conceive, impose any greater obligation on him to do so, than now exists under the Law: for, should he still fail, unless I could proceed to a new appointment, as aforesaid, I fear the *rule* would be a dead letter, though the *law* may not be; as he would not be indicted for a disobedience to the rule, but for not complying with the law. As to enforcing obedience to such rule by attachment, unless there was something more disrespectful to the Court, than the mere non-execution of the Bond, I should consider the ground taken in the argument in this case, to-wit, that the party was advised and believed the Law unconstitutional, and that, as to this matter, he wished a regular trial before a competent Court and Jury, as sufficient ground for not awarding such attachment. Or, if the party should state his inability to give such Bond and Security, surely this would purge any thing like contempt: and yet, the greater the inability to give Security, the greater necessity there might be to enforce the Law. The consequence would be, that, in the end, we must either discharge him from the alleged contempt, or imprison him until he gives Bond or resigns his office; and, in the mean time, he may be acquitted upon an Indictment before another Court.

I greatly doubt, therefore, whether, in a case of this kind, where the alleged offence would proceed from no corruption in office; where the course of justice would in no wise be delayed; where no disrespect would be intended to the Court; but, merely, where the party may or may not be under a mistake as to his constitutional rights, which he thinks he can avail himself of before a proper tribunal, the extraordinary remedy by attachment ought to be resorted to; and the more especially, as it might terminate in the way above supposed.

I can therefore see no good, that is likely to result from doing more, than what is expressed in the order, which is to be entered in this case.

Judge BROOKE. If the decision of this Court could enforce the Act of the Legislature, requiring the Clerk to give Bond with Security, it would, in my opinion, be the duty of the

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Court to express an opinion on many of the points, that have been so ably discussed by the Bar: but the Act of 1810, "concerning the General Court, and for other purposes," does not seem to me to require any thing more of this Court, than to adjudge the sufficiency of the security, and to receive the Bond, when tendered by the Clerk. This construction of that Act is deduced from a consideration of it in connexion with the 11th section of the Act of October 26, 1792, entitled, "an Act reducing into one Act the several Acts concerning the Court of Appeals," &c. The consequences of the failure of the Clerk to comply with the requisitions of the first mentioned Act, it appears to me, are to be decided, if any where, in another Court; and I hold it myself to be improper to forestall the opinion of that Court by the decision of questions, not judicially before this. I admit that an extra-judicial opinion of this Court ought not, and I presume would not be considered as authority in any other Court, though inferior to this. It might have some influence and tend to violate a great principle, viz. that no citizen ought to be prejudged any where. If, indeed, I was convinced that this Court, acting *diverso intuitu*, ought to make the Rule absolute on the Clerk, and by its process could compel him to give the Bond required by the Act before cited, it would be unimportant to me what might be the consequence of its decision in another Court; but I am not satisfied that this Court is so instructed by the Act, under which the Rule, now under consideration, was made. The 2d section of that Act does nothing more, than require of the Clerks therein mentioned to give Bond with Security, to be approved by the Courts of which they are Clerks; and the 2d clause of the 3d section of the same Act declares that, if any Clerk thereafter appointed shall fail to give Bond, he shall forfeit his office; plainly indicating that the Clerks *then in office* were not to forfeit their offices, for a like failure, by the decision of the Court, of which they were Clerks. But, if it could be inferred, from any thing in the Act, that this Court ought to make the rule upon the Clerk absolute, I know of no process here, by which it could enforce its judgment, and effect the object of the law. It is not pretended that a forfeiture of the office would be the consequence of the failure of the Clerk to obey the rule. The only process to which the

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Court could resort, it has been admitted, would be an attachment for a contempt: but I am unable to perceive that inability to give the Bond with Security, if it should so turn out, would be a contempt of the Court; and I am unwilling to give a Judgment, which might be ineffectual. It is true, that if, by the order or decree of a competent Court, an individual was required to give Bond with Security, and failed to do it, he would be guilty of a contempt, and an attachment would be the proper process to compel him: but that Order or Decree would be founded on some pre-contract, or some transaction leading to that consequence: or if, in this case, I could be convinced, that the failure to give the Bond would be the neglect of an official duty, enjoined upon the Clerk by the order of this Court, I should deem it proper, that he should be attached for the contempt: but, how the failure, to give a Bond for the faithful performance of his duties as Clerk, can be a neglect of that duty, I am yet to learn. An attachment in this case might compel him to resign; but, as that would not be the object of the law, the Court would not do that indirectly, which it could not do directly. I am of opinion, therefore, that the entry agreed upon by a majority of the Court, is the proper one in this case.

Judge ROANE. This case comes before the Court upon a Rule upon the defendant, as Clerk of this Court, to shew cause, why he should not give the Bond required of him by the Act of February 19th, 1816, ch. 32.

Although there has been no regular rule made of Record, nor any formal service upon the Clerk, the Court informed the Clerk that it required this Bond from him; and, on his declining to give it, he asked and obtained leave to shew cause against it. That cause has been shewn, and the effect of our judgment will be to discharge the rule, which is to be understood as made, or make it absolute. The Judgment now to be given is also to be rendered *nunc pro tunc*: it will relate back to the time when the Bond was required; and will consequently overreach the 1st of November 1816, the day, on or before which the Bond is required to be given. The Judgment will so relate, because the case was taken up in due time by the Court, and was only postponed at the instance of

the defendant, and on account of the absence of his Counsel. If, therefore, on the rendition of this Judgment, or within a reasonable time thereafter to be limited by the Court, the Bond in question shall be given, the defendant will have complied with the requisition of the Act, although the day above-mentioned is now passed.

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The cause shewn by the defendant by his able Counsel against this rule, and the only cause is, that the act in question is unconstitutional as it regards him, because it imposes a duty on him, which, he contends, the Legislature had no right to impose. This broad and important question it is my intention to discuss and to meet: but I understand that my Colleagues have *waived* a decision upon it. I am glad to find that they have done so, because, under our *present* impressions, as disclosed in conference, we should probably not have agreed upon this important question. I was glad to find, also, that they *seemed* to agree with me that two Judges, of a Court, consisting of five, ought not to exercise the high power of declaring an Act of the Legislature unconstitutional. The memorable Glebe Cause, in this Court, furnishes a precedent on this important point. The number of the Members, who sat in that cause, having been reduced to three by the death of our venerable President, and two of those three being of opinion that the law in question was unconstitutional, the Court, on my motion, declined to decide the cause, on this ground, (although every Judge was prepared to deliver his opinion,) until the vacancy in the Court was supplied: as soon as that was done, the cause was argued anew, at great length, and the result of the decision was entirely varied. The course, which, I understand, is now pursued by the majority of the Court, conformably to this great precedent, gives me satisfaction: they do not decide against the Act on the ground of unconstitutionality; they do not sanction the pretensions, as I think, the extravagant pretensions, advanced by the defendant's Counsel: they give no opinion upon the great question, made by the defendant's Counsel: they only decline to give an opinion in the case. That question, therefore, remains entirely open for decision, whenever, hereafter, the Court shall think it ought judicially to decide it.

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In thus declining to decide upon this great question, I am sorry that I cannot concur with my worthy colleagues. I must be pardoned for saying that I differ from them entirely. I cannot discern how, if the law be not unconstitutional, if the authority of the Act be unquestioned, which Act makes it the duty of the Clerk to give a Bond *in the Court* by a certain day, and makes it the duty of the Court to take sufficient Security thereto, the Court can avoid perfecting this duty. I do not see that an Act of the Legislature, passed in pursuance of the Constitution, is to be considered as a dead letter. I do not see why a posterior qualification is not to be administered to the Clerk, if it be *legally* required of him, as one which is original. I understand it to be the duty of the Court to exact from the Clerk every Bond, which forms a part of his qualification for the office, and not leave it to the mere pleasure of the Officer, whether he will give the Bond, or not. It is at least the duty of the Court to exact it so far, as to render a Judgment that he should give it; however it may be as to ulterior measures to enforce it, as by attachment, or otherwise, on which at present I forbear to give an opinion. In thus acting, the Court proceeds *civilly*, and with a view to a specific performance (if I may so express myself,) of a most important duty. This Court has no right to suppose, (and on that ground to forbear to give its opinion,) that the defendant will stand out against its decision, when declared, and that he will, in consequence thereof, be prosecuted, before *another* tribunal, on the ground of a forfeiture of his office. This event may happen; but, until it does happen, its possible occurrence forms no reason why this Court should not proceed. If it does happen, that Court will proceed entirely *diverso intuitu* from this Court: it will proceed as a *Criminal* Court, and on the ground of an *offense* already committed. Under such different circumstances, therefore, there can be no objection to each Court acting upon the same subject. A solemn duty imposed on this Court is not to be abandoned; because the same question may possibly arise in another Court of an entirely different character, and under an entirely different state of things. There is no trait in the genius of our institutions which justifies the aban-

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doing the specific performance of a regulation of great public utility, because the offender may be punished for not performing it, and from a fear that what is done in one case may have an influence in the other. It is more desirable, under the spirit of our laws, that a measure of great public utility should be carried into effect, than that the party should be punished for not performing it. The objection now taken is that this Court ought to leave the question free for the criminal Court, in the *possible* case, which may happen. This objection seems to me to be grounded in too much delicacy, not to say squeamishness, and requires from us too great a sacrifice. It requires from this Court a dereliction of a solemn duty. I shall not stop to inquire what would be the effect of the opinion of this Court in the criminal Court; but it strikes me at-present, that that Court would not hold it obligatory; and then the ground of this objection would fail. That Court would probably so decide, because it would hold itself supreme in its criminal jurisdiction: but, at any rate, the *Jury*, in that Court, would pass upon the whole case, including law and fact, the decision of this Court not excepted.

We ought, therefore, as I humbly conceive, not to shrink from this duty, and are bound to meet and decide the great question made by the defendant's Counsel.

In shewing cause against the rule in this case, the defendant, by his Counsel, has only made the objection, that it was incompetent to the Legislature to throw a new duty upon him of the character of the one in question, on account of his being an existing Clerk: on account, as they alleged, of its invading a vested Interest. They have not complained, nor could they complain, that the penalty of the Bond required is unreasonable; for then, it might be argued, that it was rather the design of the Legislature to oppress the Clerk than to advance the public interest: the reasonableness of the penalty is *established* by the consideration that it is the same penalty, which had, before, been required from other Clerks of lower degree, than the Clerk of the Supreme Court of the Commonwealth. They have not complained, nor could they complain, that the few Clerks, embraced by the provision in question, were singled out as the objects or victims of the mea-

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sure in question : for then a suspicion of a similar intention might have been possibly entertained : the object of the Act was to round the whole cap, by requiring the same Bond, from these Clerks, which all others of similar character had already given. They have not denied, nor could they deny, but that the measure is most salutary, and necessary for the public good, if it be constitutional : such a denial would stand confronted by the general sense of the Legislature, which, in every other instance, has required similar Bonds. It stands also confronted by the fact that our people are compellable, in many instances, to place their money and their muniments of title with the Clerks, and that those Clerks may sometimes, prove to be equally insolvent and abandoned. Those Counsel have taken the single ground of unconstitutionality above mentioned ; and they could have taken none other.

In the view I have taken of this subject, it is, perhaps, not very important to decide, whether the defendant holds his office during good behaviour, by a constitutional, or a legislative tenure ; though it is obvious that, in the last case, the power of the legislature to regulate or abolish the office is less questionable. No instance has occurred of a *constitutional* officer being wholly deprived of his office : whereas the former Court of Appeals and District Courts have been *abolished* ; because the public good required it, and the Judges acted therein, respectively, as mere legislative Judges. A power to abolish, would seem to include a power to regulate ; not in a wanton manner, indeed, and to oppress the officer, but to promote and advance the public good.

On the best consideration, I can give this subject, it seems to me that the Clerk of this Court holds his office by no constitutional tenure. The 14th section of the Constitution, which relates to the appointment and tenure of the *Judges of this Court*, and most of the higher officers of government, says nothing about the appointment or tenure of the *Clerk's* thereof. That was the proper place to have provided for it, had it been intended. On the other hand, the 15th section relates solely to Justices and officers of inferior rank, (with the exception of the Secretary,) appertaining to the County Courts and to the Counties. There is not a word in this section, which can be

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tortured to apply to the *appointment* of the Clerks of the Superior Courts ; and it is therefore unnatural to apply the provision therein, relating to the *tenure* of the Clerks, to them. These words can be abundantly satisfied without, and cannot on any fair construction, be extended to the Clerks of the Superior Courts. They can not be so extended, because the first sentence of that section only relates to the *County Courts*, as it only relates to the *Justices* thereof ; because the second sentence thereof, in which *Clerks* are first introduced, and that in relation to their continuance in office, is in terms confined to the Clerks of *County Courts* ; because, in the third sentence thereof, the Clerks, thereby intended, not only mean those of the County Courts exclusively, for other reasons, but because they stand coupled with the Secretary, as the *County Court Clerks* were, in the second sentence, before coupled, and because the term "*vacancies*" also confines it to the class of Clerks already in office, and established in their tenure by the Constitution, and not to those for whose appointment a future provision was to be made ; and because, in the fourth sentence thereof, the word "*future*" is a word of relation to "*present*," and indicates Clerks of the *same*, and not of another class or character. These reasons, added to the forcible reasons, urged by the Attorney General, and to which I beg particular reference, strongly induce me to think that the tenure of the Clerks of the Superior Courts is not provided for in the Constitution : and such was the contemporaneous construction of the primeval Legislature. In none of the original Acts, constituting the Superior Courts, is any idea held out that the Clerks of those Courts hold by a constitutional tenure : and if, in the acts of a later period, the style is somewhat changed, it rather imports that the *trial* for misbehaviour is to be in the General Court under the Constitution, than that that instrument establishes the tenure of the office ; which also is probably a mistake.

If, in this particular, I am to be governed by the constructions of the Legislatures, I should prefer those, which are contemporaneous, and to which, under certain restrictions, great credit is admitted to be due : for we are told by that great Judge, Lord HOLT, (in the case of *Harcourt v. Fox*, 1 Shower 535,) " that *contemporaria expositio est optima*, because the tem-



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"per of the law makers is then best known." It is also a circumstance of great weight on this subject, that, while all the Acts respecting the County Courts, and making new Counties, make no provision for the appointment or tenure of their Clerks, this is done in every instance, in every Act establishing a Superior Court, in the Act itself. (1)

If, then, this Clerk is a legislative, and not a constitutional officer, there can be no objection to any regulations prescribed to him by the Legislature, unless it be on the ground that the Act shall have declared that the Clerk shall hold during good behaviour, and the Clerk has consummated the contract by accepting the office. It may here be observed, that even this trait is perhaps wanting in the case before us. The law constituting this Court, of 1792, (1 R. C. p. 62,) does not give the tenure of good behaviour, otherwise than by implication. The most it says is that the Clerk is to be "removable for misbehaviour, in the manner prescribed by the Constitution." But this compact, even when it is express and explicit, must not be held to too much strictness. What then would you do with the *Tipstaff and Cryer* of the General Court, who, under the act of 1777, establishing that Court, (a) were made, equally with the Clerk, to hold their offices during good behaviour. It would be rather ludicrous to see an Information filed in the General Court, against their Tipstaff, for refusing to bring a pitcher of water to the Judges, or to carry their letters to the post office. The truth is that some power must be given to the Legislature, and the interests of the people are entitled to some consideration; while the *substantial* rights of the officer are not to be lightly invaded. He is to hold during good behaviour, as contra-distinguished from a tenure during pleasure; but he is not to obstruct any salutary reform: he is not to ride upon the top of his commission, to swagger and beard the Legislature at every corner, nor to seize upon the merest *apices litigandi* to contend that a legislative Act is unconstitutional. It

(a) Ch. Rev. p.  
70.

(1) Note by Judge ROANE. I have the most satisfactory authority for saying, that the Judges of the General Court, in conference, upon *Hening's* case, in June, 1815, were unanimously of opinion, except one Judge, (who probably did not wish to give an opinion upon the question,) that the Clerk of the Superior Court of Chancery (*Hening*,) was a legislative Clerk, and did not hold his office under the Constitution; though the case was decided upon another point, namely, the Act of Limitations.

would be strange indeed, if, while the Legislature can whittle down Constitutional Courts to nothing, and abolish such as are only legislative ; if, while they can increase, almost without limits, the duties of Judges, as well as Clerks, and even diminish the salaries of the former, so as not to get below the mark prescribed by the Constitution ; it would be strange that, if, while they are in the daily habit of assailing vitally the rights of the Clerks themselves, by adding heavy duties, abolishing their Courts, reducing their fees, and dividing their Counties and Districts, this wholesome and salutary regulation should be alone beyond their power.

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The doctrines of the common law of England, in relation to the appointment and tenure of officers, as indeed almost all the constitutional law of that country, must be received in this country with many grains of allowance. I hazard but little in saying that the interests of the people are held more sacred in a Republic than in a Monarchy. In that country, all offices flow from the King by virtue of his prerogative : (a) in this country, that prerogative is abolished by the Constitution. In that country, some offices are held in fee, others in tail, and others by various other tenures : in our Bill of Rights it is declared, that magistrates are the trustees and servants of the people, and offices are prohibited from being hereditary. If in that country, this boasted tenure of "good behaviour" is amenable to the power of parliament, by virtue of its alleged omnipotence, it is here amenable to that of our limited Legislature, when it is supported by the principles of the Constitution. In all the decisions in that country, as to the inviolability of this tenure, there is an exception of the power of parliament ; and in all the decisions to be given here, there must be a correspondent exception in favour of the power of the Legislature, when acting within the limits of the Constitution, and supported by the principles thereof. It has been said that the officer before us has a freehold in his office ; and it has even been said that he has the same title to it, as if it were land. This last idea finds no countenance in our Bill of Rights, and is even reprobated by the principles of the common law of England. Although it may be that he has a freehold in his office, it is not one without impeachment of waste. He is answerable for all dilapida-

(a) 5 Bac. 120.

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tions in his office. He has a freehold in his office, I admit ; but it is only *sub modo*. It is subject to the principles of our Bill of Rights, and the greater interests of the people. If he has this tenure, it is not for his own benefit, but theirs. Am I not correct then in saying, that while the just rights of the officer to his office and its emoluments, are not to be invaded, the greater rights of the people are not to be surrendered ? A liberal construction ought to prevail in this country, therefore, under the influence of these principles, although it may produce some loss or inconvenience to the officer. But even in

(a) 5 Bac. 210. England it is held, in general, (a) that if an officer acts contrary to the NATURE AND DUTY of his office, the office is forfeited. It will be found that this principle has been acted upon in this country without objection, and that acts, *relating to* the office, essential to the public good, have been required from the officer, and always acquiesced in, although not falling, perhaps, within the narrow limit of ordinary official duties.

Thus, by the Act of October, 1784, ch. 60, after imposing an oath of office on the Clerks of the County Courts thereafter admitted into office, the Act goes on, in the 5th section thereof, to require that every Clerk of a County Court *then in office*, should take the said oath, as soon as may be, after the commencement of the Act, and that, failing therein for six months thereafter, he should forfeit the sum of one hundred pounds. Here is a new qualification imposed slap dash upon the then existing Clerks, varying only in degree, not in character, from the one now in question. Again, it was enacted, in the same section of the same Act, (October, 1784,) that every Clerk, appointed since June 4th, 1776, (more than eight years before the passing of the Act,) as well as those hereafter appointed, should *reside* in the County in which they hold their respective offices, under penalty of being incapacitated therefrom by information in the General Court. This provision affected Clerks *then in office* ; and it is not easy to see how it differs in *principle* from the case before us. This last provision of the Act of 1784, is in substance kept up and repeated in the

(b) 1 R. C. ch. 70, p. 95. Act of 1792, § 5 ; (b) thereby evincing the concurrence of two Legislatures on the subject : the first mentioned provision was omitted in the Act of 1792, only because all the Clerks within its purview, had, before the passage of the Act of 1792, by

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taking the required oath, complied with the requisition in question. There was no hubbub raised in the country by these salutary regulations, although they went farther than the section before us, in affixing penalties, and declaring an incapacity for the office, in case of non-compliance. The acquiescence in both measures was universal, and affords a strong proof of the sense of the people, as well as the Legislature in relation to the principle in question. The oath required in the first instance was as much a new qualification, and was as wide from the ordinary duties of the office, as the bond now required. If then the legislature is justified in the *principle*, on which it proceeds, who is to limit them as to *expediency*? As to the measure of the sanction, deemed necessary for the interest of the people? So, the change of residence imposed on existing Clerks by the second provision was equally a new duty, equally out of the line of ordinary official duty, and equally *injurious* and *inconvenient* to the then incumbents, (to say the least,) with the duty required in the present instance. It required of them perhaps to purchase and procure a new place of residence. And the Epoch of June 1776 was then fixed on, because thenceforward a new system was to prevail, which consulted the interest of the people as well as that of the individual.

Again; in the Act, which first divided the High Court of Chancery, (a) it was made the duty of the Clerk of that Court, (and that without any compensation allowed therefor by that Act,) to arrange and send out to the other Courts, thereby established, the papers thereto belonging. This Act, after almost ruining the Clerk, by the withdrawal of his fees, makes him, as it were, commit the act himself. The *principle* of this provision has been followed up, in all the subsequent divisions of our Courts of Chancery and Courts of Law. This duty has always been performed, though, so far from falling in with the idea of an ordinary discharge of official duty, it in a degree prevents the possibility thereof. It is an act, too, attended with expense and inconvenience, perhaps, at least, equal to that required in the present instance. I have never heard of a murmur or complaint, against this exercise of power, by the Clerks, or others, although the measure cut deep in every instance. It was universally acquiesced in.

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In all these several instances, (and, I expect, others of a similar character might be shewn,) the acts required of the Clerks were not within the strict line of their antecedent official duty, and could none of them, except, perhaps, the last, have been performed by a deputy : yet they were required from the officers, *as Clerks* ; and, without their co-operation and assent, these salutary reforms could not have been effectuated. The ground now taken would have defeated the wishes of the Legislature in every instance ; and yet the officer would have been held irresponsible !! I conclude, therefore, that every thing is to be considered as an official act, under the principles of our Constitution, which the Legislature has a right to exact from the officer, and which he alone can perform. The Clerk of this Court can alone give the bond required by the Act ; and this is decisive of the question. It is far too narrow a construction to say that nothing is an official act, which cannot be done by deputy. This idea is overruled in the instances I have mentioned ; and would even prove the original swearing in and giving bond by the Clerk to be private and not official transactions !!

This view of the case is decisive of the present question, unless a difference is taken in consequence of security being demanded from the Clerk. I have already said, that this case differs only in *degree*, not in principle, from those already stated : and I even understood it to be conceded that an oath or bond required from the *Clerk himself* would not have been objectionable. This case is not more foreign than the others from the ordinary routine of official duty. It agrees with them in this, that they are all necessary to a salutary reform in the system, and can be done by the Clerks, and none other. It is essential to the object in this instance, that security should be given : for the want of responsibility in the officer has made the measure necessary. To object to giving security for the faithful discharge of duty, in a case, in which an officer may not have principle enough to prevent his plundering his suitors, nor fortune enough to repair the damage, is objecting to the remedy altogether. It is objecting to it, at the same time that our people are compelled to place themselves within his power.

In point of hardship, too, the measure required, though a *sine qua non* of the reform, can not exceed the other requi-

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tions of the laws before noticed. Applied to this case, it is hardly credible, that a man, who fills the Clerkship of the highest Court in the Commonwealth cannot get security in the moderate sum of ten thousand dollars; a sum required from the Clerks of many of the Courts of subordinate character. If this should unfortunately be the fact, it is an extreme case; and this Court is not to take extreme cases into its consideration. If this should chance to be the fact, it shews the wisdom of the law in question, and augers ill to the safety of the suitors in this Court. If this should be the fact, it is better, that a particular inconvenience should be borne by the Officer, than a general grievance by the public. It is better that an unworthy, or even an unfortunate member should be lopped off, than that the whole community should suffer. But there is no such inconvenience in the case before us. This ground has not been taken by the Clerk in this case, and we have no right to assume it for him. He places his case on general principles, and by these it ought to be decided. As to the objection, more particularly, that, although a Clerk may be called on to act by himself, he ought not to be compelled to get the aid of others; there is certainly nothing in it. Nothing is more common than for a man to contract to do, or be *decreed* to do an act, which does not depend upon himself merely, but on others. Such instances occur every day in the Courts of Equity; and the principles, which guide the decisions of those Courts, form a correct standard for the government of the Legislature. A Court of Equity will always compel a man to do *by another* that, without which he is not entitled to the relief he seeks. The objection ought not therefore to prevail in this case; especially, when it strikes at the root of the reform. If the Legislature once surmounts the objection now in question; if it once gets over the line marked out for them by the defendant's Counsel, namely, the *ordinary* course of official duty, none can limit them on the ground of expediency. They are not to be limited, at least, when they have adopted the *only* remedy for the evil: nor when their work shews no design to oppress, and invade the just rights of the Officer, but only to advance the good of the public.

Every argument now urged by the defendant's Counsel, would hold *a fortiori* in favour of the former District Court

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Clerks, who, though holding by law *expressly* during good behaviour, were deprived of their offices on the erection of the Superior Courts. They were so deprived, although they were *permitted*, in general, by the Legislature, to have a preference as Clerks of the Superior Courts. These arguments would equally hold, in favour of the Clerks last mentioned, if the Legislature were to abolish those Courts and restore the former District system. In that event, a great majority of the present Clerks of the Superior Courts must remain wholly unprovided for. If the Legislature, acting for the interests of the people, should deem it proper to restore that excellent system, ought it to be impeded by the claims of these legislative Clerks? Ought their individual good to be preferred to that of the community? Ought they not to submit to a condition, tacitly annexed to their Office in its creation, and of which they could not have been ignorant, unless they shut their eyes upon the Bill of rights, that of holding in subservience to the public good? Or ought they to demand pensions from the Legislature equal to their supposed injury? The idea is ridiculous; and yet the present is a weaker case than that; for that case supposes a total extinction of the Office, whereas the Clerks in question are only subjected (for the public good) to some possible inconvenience.

If a Clerk has come into Office under a law, requiring no oath of Office, owing to the improvidence of our predecessors, or the trivial nature or amount of the then business of the Court, ought not an oath to be required from him, when these circumstances are essentially changed? Let the wise Act of 1784, already noticed, answer this question. If, owing to the greater value of money at a former period, and the smaller amount of business at that time confided to a Court, a small penalty has been required, ought it not to be enlarged, when our money has greatly diminished in value, and the trusts confided to the Clerk have greatly increased? If, in the progress of reform, the public interest requires that more monies should be paid into the Office, and more valuable papers should be confided to the Clerk than formerly, ought not his responsibility to be increased therewith? Ought this increase of responsibility to be objected to by him, when, in consequence of the augmentation of his business, the emoluments of his Office have been also greatly increased?

But it has been said, that the Legislature have, in the Act before us, given an exposition on this subject, by expressly subjecting future Clerks to the loss of their Offices, while the Act is silent in this particular as to the then existing Clerks. The Legislature have in the *plainer* case declared what should be the penalty of disobedience: in a case less plain, they have properly left it to the Courts. They have, in this last case, only declared what should be the duty of the Clerk; and have properly left it to the Courts to say what should be the consequence of a non-compliance. They have left it to the proper tribunal to say, whether the duty in question was legally demandable of the Clerk, and, if so, what should be the consequence of a non-compliance. While they have *expressly* imposed a duty upon the Clerk, they have left this *last* question to be decided upon by the general principles of the law, and not under any express provision of the Act. That decision will be to be made, in the proper Court, whenever the question shall occur, if it shall ever occur, upon the exhibition of an information or indictment, having for its object the amotion of the Clerk from his Office. With that question, I have, at this time, and in this Court, nothing farther to do, than as it may be necessarily involved in deciding the question now depending before us. That question is, whether we ought not to adjudge that the defendant should give the bond required of him by the Act. For the reasons I have assigned, I think we ought; and that the rule should be made absolute. *That*, however, is not the opinion of the majority of the Court. Their opinion has been already made known by them; and I now deliver the following, as the opinion of the Court, and it is to be entered accordingly.

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"The Clerk of this Court being required by the Act of  
"Assembly, passed on the 19th day of February, 1816, to enter  
"Bond and Security, on or before the first day of November  
"last, in the penalty of ten thousand dollars, payable to the  
"Governor for the time being, and conditioned for the faithful  
"performance of the duties of his office, and having, before  
"the said first day of November, obtained leave to shew cause  
"against executing said bond, the time to do which has been  
"extended to the present day, although no formal entry has



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" been made thereof on the records; the Court is of opinion,  
" that no neglect or laches is to be attributed to the said Clerk  
" for not executing the said Bond heretofore, but that the Rule  
" is to be considered as entered *nunc pro tunc*, and continued  
" until this time. And the Court, this day, having fully heard  
" and maturely considered the causes alleged by the said  
" Clerk, why he should not give said Bond, is of opinion that  
" it is not proper for this Court to dispense with, or sanction  
" the non-execution of the Bond aforesaid, as required by the  
" Act aforesaid, or to pronounce any opinion as to the conse-  
" quences of a failure to do so; but leaves it to the Clerk to  
" execute said bond, or not, at his own peril, to be adjudged  
" of, in case of failure, by a Court having competent jurisdic-  
" tion of the case: and the Rule is therefore discharged. And,  
" that the said Clerk may not be prejudiced by the time taken  
" to shew and consider the cause aforesaid, Bond will be  
" received by the Court within fifteen days."


February 10th, 1817. The Clerk gave bond, with Security approved by the Court, which was ordered to be recorded. (1)

(1.) Note. See also the Acts of 1816—17. ch. 24. p. 39.

Decided Febru-  
ary 1st, 1817.

### Moody and others *against* M'Kim.

1. In Eject- ON the trial of this cause, (which was an action of Eject-  
ment, if it ap- ment in the County Court of Henrico, for a Lot of Ground in  
pear from the evidence that the City of Richmond,) the defendant (M'Kim) by his Coun-  
the land in con- sel moved the Court to instruct the Jury, " that, if it should  
troversy was va- appear to them from the evidence that the Lot in controver-  
cant, when the defendant came to the possession of  
the defendant came to the possession of it, peaceably  
of it, peaceably and quietly,  
and quietly, without any pri-  
vity between him and the less-  
ors of the plaintiff or those  
under whom they claim; the  
plaintiff cannot recover, upon  
the ground of the prior possession, of the lessors, without proving *twenty years uninterrupted adverse possession*  
on their part or on the part of those, under whom they claim, or shewing a right to the possession  
by the death and seisin, in the manner prescribed by the Act of Assembly, of some person under  
whom they claim.

"the lessors of the plaintiff, or those under whom they claim, **FEBRUARY, 1817.**  
"or a right to the possession must be shewn by the death and   
"seisin, in the manner prescribed by the Act of Assembly, **Moody & others**  
"of some person under whom they claim:" which instruction the Court refused to give to the Jury; whereupon the defendant filed a Bill of Exceptions. **v. M'Kim:**

The defendant also moved the Court to instruct the Jury, "that, if a subsisting legal Title to the Lot in question is shewn to be out-standing in a third person or persons, and no privity is shewn between the defendant and the lessors of the plaintiff, or those, under whom they claim; and it shall appear that the defendant was not an intruder or trespasser upon the possession of the lessors of the plaintiff, or those, under whom they claim; that such out-standing title is a bar to the action." The Court also refusing to give this instruction, the defendant again excepted.

The Counsel for the defendant having offered to prove, as a bar to the plaintiff's Title, a legal Title out-standing in a stranger, the plaintiff by his Counsel moved the Court to instruct the Jury, "that such out-standing Title, in order to be a bar as aforesaid, must be proved to be a present, subsisting, operative title; otherwise, that the presumption is that such Title in a stranger has been extinguished:" and the Court accordingly gave the instruction required; to which opinion also the defendant excepted.

The Jury found a Verdict, and Judgment was entered for the plaintiff, which, on Appeal, was reversed by the Superior Court of Law; that Court being of opinion "that the County Court erred in refusing to give to the Jury the instruction required as mentioned in the first bill of exceptions." Judgment was therefore pronounced that the Verdict be set aside, and the cause remanded for a new trial, with directions to the said Court to give said instruction to the Jury to be then empaneled.

From which Judgment the lessors of the plaintiff appealed to this Court.

*John Robertson* for the Appellants, contended that there was no error in the Judgment of the County Court of Henrico. If in any case the instruction required would be improper, this

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Court must sanction the refusal to give it. Twenty years adverse possession is not necessary, where the defendant is a trespasser or intruder without colour of title. *Allen v. Livingston*, 2 *Saund.* 111; *Jackson v. Harn*, 2 *Johns. N. Y. Rep.* 22; and *Jackson v. Harden*, 4 *Johns. N. Y. Rep.* 202, are express authorities to this effect. Priority of possession alone, as against such defendants, is sufficient. And, in support of the opinion of the County Court, it is fair to suppose that the defendant in this case was a mere intruder without colour of Title.

But if this cannot be supposed, yet it is not incumbent on the plaintiff to prove an *uninterrupted* adverse possession of twenty years. Because, to require this is to require proof of a negative, a negative which it would hardly be possible to establish even indirectly; unless actual possession could be shewn during every minute for the space of twenty years. Besides, if an interruption of the possession was necessarily a bar to the plaintiff's recovery, that fact might and ought to be established by the defendant.

So far from its being necessary for the plaintiff to shew an *uninterrupted* possession, it is clear that his possession may have been interrupted, and yet his claim is in no degree prejudiced. For example; the plaintiff relies upon a possession of twenty years, and it appears that, during this period, he was forcibly or fraudulently dispossessed, by a stranger without colour of title, and kept out of possession one or more years, but regained the possession by his own act, or by act of law under a Writ of forcible entry and detainer, or otherwise. This would be an interruption of his possession, and yet surely no reason why he should not recover against a subsequent wrong doer. On the contrary, the restitution of possession would confirm his title, or at least place him in *statu quo*.

(a) 3 *Bl. Com.*  
179 181; 4  
*Johns.* 211.

(a.) The entry of one, having no right to enter, could be of no avail to the wrong doer or to any other person, nor, consequently, in any degree weaken the title of the person dispossessed, unless the latter permitted it to work this effect by long acquiescence.

There is nothing in the other Bills of Exceptions, it is believed, deserving a comment.

*William Hay, jr. contra.* All presumption of any title, in the lessors of the plaintiff, other than what could be derived from a mere prior possession, afterwards relinquished, is excluded by the terms of the instruction requested; as also the supposition of trespass upon their actual possession.

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Mere priority of possession, in such a case, is not a sufficient title. If so, the plaintiff might prevail upon a prior possession of a single day, against any length of possession in the defendant, short of twenty years. *Allen v. Rivington*, 2 *Saund.* 111, cited by the opposing Counsel, was a case of trespass by the defendant upon actual possession of the lessor of the plaintiff. Possession by the lessor and ouster by the defendant were found by the Jury: and although, as stated, confessed by the common rule, yet they must be proved on the trial: (a) when found by the Jury then, it is not because they were *confessed*, but because they *were proved*. *Jackson v. Hazen*, 2 *Johns.* 22, is open to the same observation. It was a tortious entry of the defendant upon the lessor's actual possession. In *Jackson v. Harden*, 4 *Johns.* 202, the prior possession of the lessor was *under colour of title*.

(a) *Runnington on Eject.* 23.

The mere priority of the possession then is not sufficient. Yet, as a person may, upon a mere possessory right, recover under some circumstances; if it be not the *priority*, what is the quality in the possession, which is the foundation of the right? Such a length and kind of possession as would bar the right of entry, or in the words of the instruction asked, twenty years uninterrupted adverse possession.

The uncertainty, which would prevail without such a rule, is an argument in favour of it. If twenty be not the number, what number of years shall it be? one, two, five, or ten?

The Rule contended for may be fairly deduced from the principles of the action. The plaintiff must recover on the strength of his own title. (b) It is an answer to the action therefore to shew a right of entry in another. Where possession then is the only title, it must be such as will toll the entry of the owner; and this is twenty years continued adverse possession; otherwise, there will be a subsisting right of entry in the owner, which may be set up in bar to the action.

(b) *Roe on dem. of Haldane and Urry v. Harvey*, 4 *Burr.* 2487.

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Again, the plaintiff must recover upon the *right of possession*. (a) It is implied in the term, "right," that it should be *exclusive*. It cannot be in two. If then the owner's entry be not tolled, it must be in him; and the plaintiff cannot recover upon any possession, which is not sufficient to toll such entry; for he would not have the *right of possession*.

(a) Per Lord  
Mansfield, in  
Taylor ex di  
miss Atk yns v.  
Horde, 1 Burr.  
119.

The rule contended for results clearly from another principle of the action; that, notwithstanding the confession by the common rule, an ouster must be proved at trial; by which is not meant "a putting out by the shoulders," (to use Lord Mansfield's words,) but an actual entry upon the possession of another. The confession is intended to facilitate the proceedings, but not to give the lessor a right in a case, in which he has none. (b) A person cannot be ousted of that, which he has not. Where the premises are *vacant* (as this case supposes) when the defendant enters, the injury is of course *to the right of possession*, as there is no *actual* possession to be disturbed; and that right is in the owner.

(b) *Runnington*.  
23.

*Stokes v. Berry*, 1 Salk. 421. is an authority of weight in support of the rule, I contend for. It will be said, perhaps, that this authority decides such a possession to be sufficient; but not that no other would suffice. The decision is expressly founded upon the continuity of possession for twenty years. Why mention this with such emphasis, if a possession short of that time is sufficient. Why the reference to the Act of Limitations? At any rate, the case decides the kind and length of possession required to toll an entry, which, under the circumstances of the case, it has been attempted to prove, must be shewn in the lessor.

This rule also claims support from *Birch v. Alexander*, 1 Wash. 34, by analogy from the length and kind of possession required in a Writ of right. The Court must be taken to assert the proposition that sixty years uninterrupted adverse possession is necessary in that proceeding, where possession alone is relied on. The same criticism may be made upon that case as upon *Stokes v. Berry*. If the Court had not thought it necessary, why catch at a shadow? Why not give the better answer that it was not necessary?

The case of Landlord and Tenant, relied upon by the opposing Counsel, by no means conflicts with these principles.

A recovery in such case is permitted from the *privity* between them; the defendant holding over being *estopped* from disputing the title of his landlord. But, in our case, all *privity* is excluded by the terms of the instruction.

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3 *Bl. Com.*, also cited by the Counsel, is an authority in our favour: the possession which is *prima facie* evidence of title is the *actual possession*, which is in the defendant.

But, it is said, if *trespass* could be maintained, why not Ejectment? Because *title* is necessary in the one case, and not in the other, as explained by Lord KENYON in *Graham v. Peat*, 1 *East*. 242.

Again, it is said that the instruction asked cannot be correct, because it requires the plaintiff to prove not only twenty years adverse possession, but *uninterrupted* adverse possession; that this is calling upon him to prove a negative, and would not be necessary against the owner; and that the action could be maintained if the possession had been expressly found to have been interrupted.

This argument is founded upon a misapprehension. The word *uninterrupted* is used, not in relation to the *peace or quietness*, but the *continuity* of the possession. As applied to the adverse character of the possession, it can have no other meaning; and it would be doing violence to give it any other, when applied to any other quality of the possession. It is, therefore, not a negative which they are called upon to prove, but an affirmative proposition, viz. twenty years *continued* adverse possession. And this sense of the word is fully fixed by the authorities of *Stokes v. Berry* and *Birch v. Alexander*, in which it occurs. Now the continuity is implied in the very terms *twenty years adverse possession*; and the use of the word *uninterrupted* can at most subject us to the charge of tautology, but not of error in law.

*Robertson in reply.* It is said that, if prior possession alone be sufficient to authorize a recovery in Ejectment, the possession of one day would be good against that of nineteen years. But does not the same consequence follow, if Mr. Hay's rule be adopted, requiring proof of twenty years possession? Under the operation of this rule, a quiet possession of nineteen years

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The phrase of "*vacant lot*," in the Bill of Exceptions, is relied upon as shewing that the possession must be considered as abandoned. No such inference can be drawn. A Lot or House may be *vacant*, and the possession not relinquished: possession once taken will continue till some act be done by the real owner, (2 Bl. Com. 196.,) or, at least, until the adverse entry of some other person.

And this gives the answer to the observation that all the cases from *Saunders* and *Johnson* are cases of trespass upon the actual possession. So too is the case at bar a case of trespass upon the actual possession, unless there could be no possession of a vacant Lot: and the case in 4 *Johnson* is precisely analogous in this respect, being the case of an entry on a vacant piece of Land.

The plaintiff, it is contended, must recover on the strength of his own title, and must shew such a length of possession as tolls the entry of the owner. This might be necessary in an action against the owner, but not against a stranger. It will be admitted that a Landlord is not bound to shew any Title in an action against his Tenant: and *a fortiori*, no such proof could be required against one, who intruded on the possession without leave and without right.

Mr. Hay says that an *actual* ouster must be proved; and that no ouster could have taken place in this case, because the premises were vacant. The answer is that, after Verdict, it must be presumed that every thing was proved, without proving which the plaintiff could not have lawfully recovered, unless the contrary appears. Consequently, the plaintiff in this case must have proved possession in himself, and ouster by the defendant.

It is not believed that any case can be found to justify the position that a defendant without colour of title, not even relying upon an out-standing title in another, would be permitted to hold against a plaintiff, having had peaceable possession for nineteen years. The rule established in *Allen v. Rivington* ought not to be considered as reversed, (any more than that, which prevails between Landlord and Tenant, Mortgagor and

Mortgagee,) by the decision that a legal Title must be shewn **FEBRUARY, 1817.**  
in order to recover in Ejectment.

This latter rule itself was strongly opposed by *Ld. Mansfield* and *Buller*; (a) it reversed the rule, as it had stood for many years before; as it prevailed, when we adopted the common law of England, and had ceased to be bound by any new rules or laws she might afterwards establish.

*Meody & others v. M'Kim.*

(a) *Doe on dem. of Bristol v. Pegge*, cited in *Note to Goodtitle v. Morgan*, 1 Term Rep. 758; *Doe v. Staple*, 684.

The word "*uninterrupted*" *Mr. Hay* remarks, as applied to possession, has no relation to its *peace* or *quietness*, but to its *continuity*. On the contrary the word is always used in the former sense, which is its common acceptation. In *Comper* "an *undisturbed* possession" is the phrase employed; in 3 *Jahas*. 375, "a *peaceable* possession," and in 2 *Salk*. 685, "a *quiet* possession," are the terms used, all having the same meaning. It is in this sense it must be understood, if the rule contended for be established. And, under this construction, the tortious entry within twenty years of any individual will enable a subsequent intruder to maintain his ground, or, at least, to put the plaintiff to the proof of a legal title.

**February 1st, 1817.** Judge **ROANE** pronounced the Court's opinion that the Judgment be affirmed,

**Robertson and Company against Williams and Smith.** Decided, Feb. 3d, 1816.

THIS was an action of Debt, in behalf of the Appellants, on a promissory note negotiable at the Office of Discount and Deposit of the Farmer's Bank of Virginia, at Petersburg, against *Samuel G. Williams* the maker, and *Burwell Smith* the payee and first endorser. The note was in the usual form, and duly stamped, dated August 9th, 1814, for fifteen hundred dollars. 1. If a promissory note, negotiable at Bank, be made and endorsed, for the purpose only of obtaining accommodation for the maker, and being left by him with a second endorser, to be lodged in the Bank for discount, be fraudulently put into circulation by such second endorser, to raise money thereupon for his own use; a third endorser, knowing nothing of such fraud, may cause the note, (if lodged in the Bank for collection, and not paid when due,) to be protested as to the maker and prior endorsers, pay it himself, and thereupon maintain his action against the maker and first endorser; notwithstanding no valuable consideration passed, or was contracted for, between him and the second endorser, but he made the endorsement merely from the motive of enabling such second endorser to get the note discounted at the Bank.

\* See *Norvell v. Hudgins*, 4th Munf. 406.



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lars, "*value received*," payable in sixty days, "without offset;" but the words, "*credit the drawer*," were not subjoined. It was endorsed by "*Burnell Smith*," "*James F. Lockhead*," "*William Robertson and Co.*," and "*Peyton Mason, sr.* by *Arch'd. Todd*." Issue being joined on the plea of "*nil debent*," the plaintiffs, at the trial, proved the handwriting of the maker, and of the first and second endorsers. They also proved, that when the note became due, having been placed in the Office of Discount and Deposit of the Farmer's Bank of Virginia, at Petersburg, for collection, it was duly protested, for non-payment, as to the said maker, and first and second endorsers; which protest was given in evidence, certified by a notary public, with his seal annexed. The plaintiffs proved that, after the said protest made, they, being the next endorsers, paid the whole amount of the note at the said Office of Discount and Deposit, without the same being protested as to them.

The defendants then proved that the defendant *Williams*, having previously obtained an accommodation, at the Petersburg Office of Discount and Deposit of the Bank of Virginia, to the amount of seven hundred and fifty dollars, through the agency of the said *James F. Lockhead*, (a resident of Petersburg, and the defendant *Williams's* town endorser,) and being desirous to procure an accommodation for a greater amount, to wit, the amount of twelve hundred dollars, at the same office, through the same agency, wrote his name on the *blank* stamped paper, whereon the promissory note in question was afterwards written, and procured the other defendant *Smith* to endorse his name thereon, and sent the said stamped paper, so signed and endorsed, to the said *James F. Lockhead*, (being still in *blank*,) to be by him filled up with a promissory note, in the usual form, for the sum of twelve hundred dollars, for the particular purpose of procuring, if he could, from the said Office of the Bank of Virginia, an accommodation for the defendant *Williams* himself, to that amount, and for no other purpose whatever; and, accordingly, no consideration whatever passed from *Smith*, the payee of the said note (as it was afterwards filled up) to *Williams* the maker thereof, or from *Lockhead* the second endorser, to *Smith* the first endorser: that, after sending the said note, so signed and endorsed in blank,

the defendant *Williams* sent to *Lockhead* another piece of stamped paper, *blank*, except as to the signature, with his signature thereon, and the endorsement of the defendant *Smith*, to be by the said *Lockhead* filled up with a promissory note, in the usual form, for seven hundred and fifty dollars, in order to renew and continue his accommodation to that amount, if the accommodation to the amount of twelve hundred dollars should not have been obtained, and requested *Lockhead* to return the first mentioned stamped paper, if the same should not have answered the purpose, for which it was intended; but *Lockhead* did not return the same, alleging that, as both the maker and endorser lived at a distance, in the country, (as was the fact,) it was necessary that he should retain the said paper, so signed and endorsed in blank, to be resorted to in the event of any accidental omission of the said *Williams*, at any time, to supply him with promissory negotiable notes for the purpose of renewing and continuing the accommodation, he had already obtained as aforesaid; the said *Lockhead* being his second and *town* endorser; in which reason the defendant *Williams* acquiesced, and left the said stamped paper with *Lockhead*, for that purpose, and no other: that *Lockhead*, having failed to obtain for the defendant *Williams* the additional accommodation, he desired, and retaining in his hands the said stamped paper, filled it up with the promissory note in question, and, adding his own endorsement next after that of the defendant *Smith*, placed it in the hands of a broker for the purpose of raising money thereon for his own use; and, the broker afterwards informing him that another *town* endorser was wanted to give full credit to the note, and particularly naming the plaintiffs as the endorsers, who were required, or would be satisfactory, he carried the same to the counting house of the plaintiffs, and asked their Clerk to put their endorsement upon it, telling him that it was wanted by him in order to put the note into Bank for discount; and the plaintiff's Clerk did accordingly endorse their name and firm thereon, being ignorant at the time of all the circumstances above stated, and verily believing the whole transaction to be fair, and the said *Lockhead's* purpose to be what he stated; and this endorsement of the plaintiffs, so made by their Clerk, was made *without any valuable consideration*, but merely as a friendly act, done at the re-

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quest and for the accommodation of the said *Lockhead*, and to give additional credit to the note, without any privity between the plaintiffs and the defendants; the latter being personally unknown to the former, though the credit of the endorser *Smith* was known to the plaintiff's Clerk; and the endorsement of the plaintiffs being so obtained, *Lockhead* again carried the note to the said broker, who disposed of the same at a discount of two and a half per cent. per month; and so it came afterwards into the hands of *Peyton Mason*, the last endorser; but neither the plaintiffs, nor their Clerk, at the time of his endorsement for them, or at the time the said note was afterwards retired at Bank by them, had any manner of knowledge of the circumstances, above stated, of fraud on the part of *Lockhead* in improperly putting it into circulation, or any knowledge of the manner, in which he had disposed of it after their endorsement, though they knew it had not been discounted at Bank; and the defendants both remained entirely ignorant of the conduct of *Lockhead* in relation to the same, or of its having ever been put into circulation at all, until after it had been retired at the Bank by the plaintiffs, and payment thereof was demanded by them of the defendant *Williams*.

It was farther proved, that the negotiable note above set forth, is not what, according to the course of business, is, in the Banks in the State of Virginia, called an *accommodation* note, but is what is there called a *real* note; notes of the former kind, discounted or offered to be discounted at the said Banks, having always a memorandum subjoined, that they are for the credit of the maker or drawer. It was also proved, that the endorsement by the plaintiffs of the said note, at the request and for the accommodation of *Lockhead*, without any other consideration, is according to the usual and common course of such business, where the note is intended to be offered at Bank for discount; and that the payment of the contents of the said note by the plaintiffs, for the purpose of retiring the same at Bank, after it had been so as aforesaid protested as to the maker and the two first endorsers, without waiting 'till it was protested as to themselves, was, also, according to the usual and common course of business, in such cases, where the endorser is able to retire the note, and has no knowledge or suspicion of any fraud or unfairness in the inception of the note, and the putting it into circulation.

It was agreed between the parties, that, if the several Acts of Assembly, concerning the Bank of Virginia and Farmer's Bank of Virginia, are to be considered as private Acts of Assembly, they shall be taken and regarded, as set forth in the record in this case.

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And this being all the evidence in the cause, the defendants moved the Court to instruct the Jury, "that, if from that evidence, it should appear to them, that the defendants were *defrauded* by the said *Lochhead*, when he put the note aforesaid into circulation, without their knowledge, approbation or consent, and attempted to raise money upon it, as aforesaid, for his own particular benefit; and if it should farther appear to them that, *when the plaintiffs endorsed the said note, they neither paid nor agreed to pay to the said Lochhead, any valuable consideration* for the same, in money, bank notes or other property, *nor received nor contracted to receive from him any such valuable consideration* for so doing; then, in law, under all the circumstances of this case, the said defendants are not liable to pay the amount of the said note, or any part of it, to plaintiffs, who thus acquired the said note without valuable consideration." The Court instructed the Jury accordingly; to which opinion the plaintiffs filed a bill of exceptions.

Verdict and Judgment for the defendants. The plaintiffs appealed to this Court.

*Leigh and Wickham* for the Appellants.

*Call* for the Appellees.

*On the part of the Appellants*, it was contended that the note in question stood on the footing of a Bill of Exchange, by virtue of the amendment of the Bank Charter. *Smith's* endorsement upon it in blank, with the signature of *Williams* on its face, and a \$1500 stamp impressed upon it, was a letter of credit from *Smith* to *Williams* to that amount; and *Williams's* delivery of this blank to *Lochhead*, with this stamp, and his own signature and *Smith's* endorsement upon it, was a letter of credit from *Williams* and *Smith* to *Lochhead*, to the same amount.

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The proposition is bottomed on direct and conclusive authorities; *Russell v. Langstaffe*, Dougl. 514; *Collis and others v. Emmet*, 1 H. Blacks. 313.

It is no objection to the claim of *Lockhead's* endorsees, that the paper was put into his hand for a particular purpose; and that he, violating the trust reposed in him, put it into circulation for his own benefit; *Robertson and Co.* having no notice

(a) *Collins v. Williams and Smith's equity.*(a) Nor is it any objection against *Lockhead's* endorsees, that he committed a gross fraud on *Williams and Smith* in putting this paper into circulation;

(b) *Miller v. since the endorsees had no notice of the fraud.*(b)

*Race*, 1 Burr. 452. *Grant v. Vaughan*, 3 Burr. 1516; *Peacock v. Rhodes*, Dougl. 633. It would not be easy to divine the ground of the Judgment of the Court below, if it were not stated in the record: it is, that, at the time when *Robertson and Co.* endorsed the note, they neither received nor paid any valuable consideration for it.

We know it has been held that, where the holder of a promissory note has given no consideration for it, and afterwards puts it into circulation, the subsequent holder can only recover

(c) *Wiffen v. Roberts*, 1 Esp. N. P. cases. 261; *Borber v. Backhouse and others*, *Peake's N. P. cases*. 81; *Ledger v. Ever*, *Ib.* 216; *Smith v. Knox*, 3 Esp. N. P. cases. 46; *Lanson and others v. Weston and others*, 4 Esp. N. P. cases. 56; *Duncan v. Scott*, 1 Campbell's Rep 100; *Rees v. Marquis of Headfort*, 2 Campbell's Rep. 574. the actual amount by him paid for it.(c) These cases shew that, where a fraud has been committed on the drawer or acceptor of a bill, or maker of a note, and the endorsee has notice of it, or where the drawer or acceptor of a bill or maker of a note has received no consideration for it, and the endorsee has paid for it only part of the contents; in the first case, he shall not recover at all, and, in the second, he shall recover only what he paid for it; or, if he paid nothing for it, nothing.

The first branch of the rule has no application whatever to this case. As to the second, it is inapplicable also; because,

1st, The risk which *Robertson and Co.* ran, by the endorsement, was a sufficient consideration to vest the property in them, by relation back to the time of the endorsement, if they afterwards were thereby made liable for the contents; and 2dly, *Robertson and Co.* did actually pay the full contents of the note, as a consideration for it, when they retired it from bank; and this consideration has relation to the time of their endorsement. It is material to consider that their conduct was innocent throughout, and according to the constant course of business. *Lockhead's* fraud cannot affect them, as they were ignorant of it. Suppose the first endorser, *Smith*, had been the

sufferer. Could not he have recovered of *Williams*? Yet he gave no consideration at the time. Suppose an ordinary accommodation note, protested, for non-payment, as to the maker, taken up by the endorser: cannot such endorser recover of the maker? Yet, in no case of that kind, does such endorser pay a consideration, for the note, at the time of endorsement. The principles on which the Court below proceeded, would annihilate almost the whole of the mercantile transactions at our Banks.

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*Call*, for the Appellees, observed that, if the note was to be considered as a foreign Bill of Exchange, the plaintiffs did not use due diligence, and give reasonable notice to the defendants of the non-payment and protest. For, as *Williams* did not reside in town, when the note was signed by him, application should have been made to him in person, or at the place of his abode; and a protest, in town, without his knowledge, was not sufficient; because the note was made *negotiable* only, but not *payable*, at the Farmer's Bank: so that, if *Williams* had even been apprised that it was in circulation, he would not have known at what place he was to pay it; and much less could he have done so, when he was entirely ignorant that it had ever been filled up. The plaintiffs therefore were guilty of *laches* even as to him; but clearly so as to *Smith*, who was in the nature of a drawer, and consequently not liable, without timely application to the maker, and notice of the non-payment and protest. Of course, the Court did right in instructing the Jury, upon the joint issue, that, under all the circumstances, the *defendants* were not liable to pay the amount of the note to the plaintiffs.

2. If the note is not to be considered as a foreign Bill of Exchange, then the plaintiffs took it, subject to the original equity between *Williams* and *Lochhead*; which would render the instruction of the Court, necessarily, right.

February 3d, 1817. Judge ROANE pronounced the Court's opinion, that the Superior Court of Law erred in giving the instruction mentioned in the Bill of Exceptions.

Judgment reversed; verdict set aside; and new trial awarded, on which no such instruction is to be given."

Decided February 4th, 1817.

## Ritchie and Wales against Moore.

### The same against the same.

1. The holder of a Bill of Exchange, with several endorsements in blank, has a right to strike out the names of the endorsers subsequent to the first, and to write over the name of the first endorser an assignment to himself; or the Bill, without such assignment, will be considered as his property, by his having it in his power to make it.

2. A Bill of Exchange does not lose its negotiable character by being protested; but, after protest, may be assigned, or transferred without assignment.

3. In an action by the assignee against the maker of a Promissory Note, the defendant cannot set off against it a Bill of Exchange, for which the assignor is responsible, unless it appear that such Bill was his property, before he received notice of the assignment.

4. In an action against a mercantile Company, a set-off of a Debt, due to an individual partner cannot be allowed.

MOORE, assignee of *J. G. Chalmers and Company* brought two actions of Debt, in the Superior Court of Prince George County, against *Ritchie and Wales*, on two Promissory Notes, executed by them, negotiable and payable at the office of Discount and Deposit of the Bank of Virginia in Petersburg; one dated August 20th, 1811, for \$500, payable 90 days after date; the other dated August 25th, 1811, for \$1000, payable 120 days after date; both which Notes, after they came to maturity, (being assigned to *Moore*) were protested for non-payment. *Nil debent* was pleaded to each action; and issue joined thereon. The two Suits were, by consent, tried together.

At the trial the defendants offered to set off, against the plaintiff's demands, the amount of two Bills of Exchange drawn by the same *J. G. Chalmers and Company* in favour of *Ritchie* individually, on *Wm. D. Wilson and Company* of New-York; one dated June 11th, 1811, for \$750, at 120 days; the other dated August 19th, 1811, for \$1000 at 90 days; both returned protested for non-acceptance; one endorsed by the said *Ritchie and Cox and Looker*, the other by the same and by *William Cox and Gideon Lee*, also; which endorsements, (except those of *Ritchie*) were obliterated by *Ritchie and Wales*. (1) It was admitted that the partnership of *Ritchie and Wales* had been dissolved, before the trial, but since the institution of the suit; and the Counsel for *Ritchie and Wales* was employed by them, as co-partners, to represent and defend the partnership, and not either partner individually. Thereupon the plaintiff by his Counsel moved the Court to exclude the said set-off from going in evidence to the Jury; which the Court did accordingly; and to that opinion there was an exception.

Verdicts and Judgments for the plaintiffs; from which the defendants appealed to this Court.

(1) Note. The protest of one of the Bills bore date at New-York, October 18th; that of the other at the same place, November 23d, 1811. The dates of the protests of the Notes, at Petersburg, were November 21st, and December 26th, in the same year.

*Leigh for the Appellants.* Premising that the negotiable Notes, on which *Moore's* actions were founded, never having been discounted at Bank, were not, as the Law stood at the time of the transaction, placed on the footing of foreign Bills of Exchange, but were liable, like all other Promissory Notes, to set-off in the hands of the assignee; (a) I shall, in the first place, consider this case as if it were certain, in point of fact, that the Bills offered as a set-off were the property of *Ritchie* individually, and not of the partnership of *Ritchie and Wales*; and as if it were settled in point of law that the law of set-off in Virginia is precisely the same, as the law of set-off in England.

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(a) See *Charter of the Bank of Virginia*, 2 R. C. p. 66; *Norton v. Rose*, 2 Wash. 233.

Under the English Statutes of set-off, it is settled, 1st, that the Debt sued for and the Debt intended to be set-off, must be *mutual* and *due in the same right*; and, 2ndly, that a joint Debt cannot be set-off against a separate demand, nor a separate Debt against a joint one. (b)

(b) *Bac. Abr.*  
(*Wilson's ed.*)  
Title SET OFF,  
Letter C. p. 136

The object of the first branch of the Rule is to protect the interest of third persons, not parties to the cause; and it is never extended beyond that object, as will appear from an examination of the cases, to which it has been applied. For example; an Executor or Administrator cannot set off a debt due to him in his own right; nor, if sued for his own debt, can he set off a debt due to him in his representative character; and *vice versa*; (c) because the plain language of the Stat. of 2 Geo. 2. cap. 22. § 13. disallows such set-off; and because Creditors and Legatees or Distributees have an interest in the assets, and the Executor or Administrator shall not have the aid of a Court of Justice to make a direct appropriation of them to his own use. 1 *Binney* 64. *Cramond v. The Bank of the U. S.* puts the Rule, as applied to Executors, expressly on the ground on which I place it,—the intervention of the interest of Creditors. So, in *Dec v. Darnton*. 3 *East*. 149, where a Judgment by A. v. B. and C. was not allowed to be set off against another Judgment recovered v. A. by the assignees of B. under an Insolvent Debtor's Act, because the interests of third persons intervened, in whose favour there were peculiar trusts by the Statute, but for the interest of third persons, the set-off would no doubt have been allowed. Now the effect of the set-off in this case, (instead of injuring the interest of

(c) *Brown v. Garland*, 1 Wash. 221.



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(third persons,) is a benefit to *Wales*, the only third person interested, who is a party to the cause, asking that benefit. I should think it impossible, that a rule designed to protect from harm third persons, *not parties* in the causes, should be extended to exclude from *benefit* third persons, *who are parties* in the cause, actually insisting upon such benefit.

As to the 2d branch of the Rule, "that a joint Debt cannot be set off against a separate demand, nor a separate Debt against a joint one," I have known instances of what I conceive to be mistaken applications of it, by decisions that, where the suit is brought for a Debt, due the plaintiff from the defendant individually, the defendant cannot set-off, against that demand, a Debt, from the plaintiff to him and a third person, *though the defendant be authorised to receive such joint Debt and grant a discharge*; or that if the plaintiff sue two defendants for a Debt due from them *jointly*, the defendants cannot set off a Debt due from the plaintiff to *one* of the defendants, *though both be equally bound for the whole debt*: whereas the true application of the rule is clearly this, that if two *plaintiffs* sue for a Debt, due them jointly, the defendant cannot set off a Debt, due him from *one* of the *plaintiffs*; for if one plaintiff sue for a Debt due him *individually*, the defendant cannot set off a Debt, due him from the plaintiff and another person *jointly*: and according to this last interpretation are all the authorities on this branch of the rule. (a)

(a) *Scott v. Trent*, 1 Wash. 77-79; *Armistead v. Butler*, 1 H. & M. 176.

It is settled under the English Statutes, that a man, who is sued on his own Bond, cannot set off a Debt, due him in right of his wife; because the wife's *choses in action* are not the husband's property, 'till reduced into possession; and he shall not be allowed thus to appropriate them, and cut off her title to them in the event of her surviving him and their being not reduced into possession, during his lifetime; especially as she is in such a situation as to be unable to assert her rights. But a Debt due to a defendant, as *surviving partner*, may be set off against a demand upon him in his own right; (b) and, *converso*, a Debt, due from a plaintiff as surviving partner, may be set against his demand in his own right: (c) and the reason is, because, in the first place, the surviving partner is the sole owner of the partnership property and the only person, entitled to receive; in the last case the surviving partner is the only

(b) *Slipper and others v. Stidstone*, 5 Term Rep. 493.

(c) *French v. Andrade*, 6 Term Rep. 582.

person, bound to *pay*; and, in both cases, the surviving partner represents his deceased partner, whose interests are therefore represented in the cause; so that the interests of no third person, who is not a party in the cause, are concerned. So, where the nominal plaintiff is Trustee for a beneficiary plaintiff, the defendant may set off, against the demand, a Debt due the defendant from the beneficiary plaintiff. This was held in *Bottomley v. Brooke* (mentioned and approved by *Ashurst J.* in 1 *Term Rep.* 623,) and in *Winchester v. Hackley*, 2 *Cranch*. 342. And the plain reason is, because the only third person, whose interests are concerned in the question of set-off, is substantially a party to the cause; and the rule requiring *mutuality* of debts, in order that they may be set off against each other, need not be applied for the protection of a third person in such a situation.

But there is a wide difference between our Statute of set-off and the English; as may be seen by comparing the two Statutes. (a) In our Act of Assembly, there is not a word about *mutuality* of debts, which by the British Statute is expressly required. The former, therefore, allows much greater latitude than the latter.

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(a) See the English Stat. in 6 *Bac Abr. Title SET OFF. Letter A. p. 135, (Wilson's Edition; the Virginian Statute in 2 R. C. p. 117.*

In fact, however, the Bills of Exchange, offered to be set off in the present case, were the property of the partnership of *Ritchie & Wales*; for, though made payable to *Ritchie* individually, they were endorsed by him, and held and offered in set-off by them, as *their* joint property; and they had a right to strike out the subsequent endorsements, (*being in blank.*) and make themselves endorsees of the payee and first endorser.

*Wickham* for the Appellee, contended that a note *negotiable and payable at Bank* is not subject to any set-off, whether the words "*without set-off*," (which are usually added from more abundant caution,) are inserted or not. The very act of making it so negotiable and payable must have this effect, from the nature of the transaction. By so doing, the party expressly waives the set-off; and every man may renounce a benefit, to which he is entitled.

But if this were not the case, debts in different rights cannot be set off against each other. Mr. *Leigh* says, the present case does not come within the reason of the rule: but it is demand-

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ing too much to say that, *wherever* the reason has ceased, the rule must cease. In many cases, positive rules must be adhered to, though the reason on which they were founded has long ago ceased. If the hardship of the case is sufficient ground for allowing the set-off, what becomes of the doctrine concerning equitable discounts, which may be allowed in a Court of Equity and cannot in a Court of Law? In the case of an executor, suing for a debt due to him in his own right, a debt to the defendant from the testator may be set off in *equity*, (if the assets appear unquestionably sufficient,) but not at *law*.

- (a) 1 Wash. 77. The cases of *Scott v. Trents*, (a) *Armistead v. Butler*, (b) and  
(b) 1 H. & M. 178. *Tucker v. Oxley & Hancock*, (c) prove the Rule. Our own decisions upon our Statute of set-off, (which is not the same with the English Statute,) are of higher authority upon this point, than the English cases. Those of *Bottomley v. Brook*, and  
(c) 5 Cranch. 34. *Rudge v. Birch*, (d) if not overruled in England, (as the counsel, *arguendo*, in 7 East. 153, *Scholey v. Mearns*, asserted without being contradicted,) are certainly contrary to the authorities in this country. In *Winchester v. Hackley*, 2 Cranch. 342, the case did not turn upon the law of set-off at all; (1) but the payments were allowed as made to *Richard S. Hackley, & Co.*, for *Richard S. Hackley*, they having the collection of the debt, with the consent of *Winchester*.

If a surviving partner sues for a debt due to the partnership, a claim of the debtor, against him individually, may be set off, because he sues in *his own name*. Upon the *form of the action*, this is admissible, though injustice may be done by it; the only remedy to prevent such injustice being in equity.

The set-off in this case is inadmissible for another reason. It is a Rule, that no set-off on the ground of a claim upon the original proprietor of the note, *accruing after notice of the assignment*, ought to be allowed against the *assignee*. Now the Notes were assigned to *Moore*, and protested; which protest gave *Ritchie and Wales* notice of the assignment to him; and this may have been *before* the Bills of Exchange became their

(1) Note. In that case, *Richard S. Hackley* transferred a debt due him from *Winchester* to *R. S. Hackley & Company*, who brought suit thereon in *Hackley's* name; and though the legal right in the debt was in *R. S. Hackley*, and the equitable right only in *R. S. Hackley, & Co.* the defendant was allowed to discount, against the demand, payments made to the beneficiary plaintiff, *R. S. Hackley, & Co.*

property ; for, when the Bills were protested, they were the property of *Cox* and *Looker* ; and there is no evidence of their being transferred to *Ritchie* and *Wales* before the protest of the *Notes*. I contend, too, that, after the bills were protested, they lost their negotiable character, and could not be assigned.

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*Call in reply.* The set-off is allowable under the express words of our Acts of Assembly, (a) which enable the Courts of Law to do what Courts of Equity had done before ; that is, to allow every equitable discount in all cases ; in the same manner, as in England, on the ground of the general equitable jurisdiction of the Court over the suitors in it, judgments, obtained reciprocally in the same Court, will be set against each other, without regard to mutuality of debts. (b) But our case would even be brought within the English Statutes of set-off. In *Cook's Bankrupt Law*, p. 577, there is a case in all respects like this ; and the decision in *Hankey and others v. Smith and others*, 3 Term Rep. 507, is strongly in our favour.

Another reason for allowing the set-off is, there was an actual assignment from *Ritchie* to the company of *Ritchie* and *Wales*. The company then, being the owners of the Bills, had a right to apply them as a set-off. *Chalmers and Co.* were creditors of *Ritchie* and *Wales* ; but *Ritchie* was a creditor of *Chalmers and Co.* *Ritchie* and *Wales* consented to set off one debt against the other. Is not this just ? And ought it not to be allowed, as no body can be injured by it ?

Again ; where a Bill of Exchange is endorsed in blank, it is payable to bearer, and any holder of it may maintain an action, as assignee of any person, whose name is endorsed. (c) *Ritchie* and *Wales* had therefore a right to take up the Bills, and avail themselves of the endorsement by *Ritchie* ; striking out all the other endorsements. (d)

The notes in question, too, were actually given in payment for these Bills. This may be fairly presumed from all the circumstances of the case ; for merchants always stipulate, in articles of partnership, that neither of them will do business separately. The Bills, therefore, though drawn payable to *Ritchie*, were probably intended for the benefit of the company of *Ritchie* and *Wales*.

(a) 1 R. C. ch. 29, 4. p. 36, 37 ; 2 R. C. ch. 89, p. 117.  
(b) *Mitchell v. Olfield*, 4 Term Rep. 123.  
(c) *Pearcock v. Rhodes*, Dougl. 633.  
(d) *Smith and others v. Clarke*, Peck's Nisi P. Rep. 225 ; *Chitty on Bills* 104, and 261.

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(a) 2 R. C. p.  
66.

All negotiable notes *discounted* at the *Bank of Virginia*, were by its charter (a) put on the same footing as Bills of Exchange; but not until *actually discounted*. (1) Now the notes in this case were not actually discounted, but resembled that in *Lee v. Love*, 1 Call 497. (2) The first Bank laws were intended, in this respect, for the benefit of the Bank only: otherwise, all notes would have been liable to be turned into Bills of Exchange.

That *Ritchie* and *Wales* obtained possession of the Bills after the protest makes no difference; for the rule is not that, after protest, the Bill is not assignable; but that, in such case, the assignee takes it subject to any equity, which existed between the drawer and the payee.

*Leigh*. Mr. *Wickham* says, that a note's being made negotiable at the Bank is a declaration to all the world, that it is not subject to set-off: but this is not the case, unless the words "without set-off" were added. Where these are not added, the credit of the merchant is never affected by the note's being protested, if there was a good set-off against it.

*Wickham*. A fair interpretation of our Act of Assembly is that the discount must be not only legal, but *just*; that the party claiming it must have *equity, as well as law*, on his side. So that the Act narrows the ground of the English Statute. My client, *Moore*, took the Notes with a reliance that they might be discounted at Bank, and were not subject to set-off. It would therefore be rank injustice to him, if the set-off were allowed, and he should lose the money. The case cited from *Cooke's Bankrupt Law* does not apply at all; being founded on the principle, that the Bankrupt's affairs are to be finally adjusted. Even debts payable *in futuro* from a Bankrupt are to be set against debts already due; but the law is otherwise in the case of a man not a Bankrupt.

(1) Note. By the Charter of the *Farmer's Bank of Virginia*, "all notes or bills negotiable at the said Bank, or any of its Offices of Discount and Deposit, are placed on the same footing as foreign bills of exchange, except so far as relates to damages."

(2) Note. In *Lee v. Love*, the assignment on the Note was *special*; and not a *blank endorsement*, as in this case.

**Call.** The case I cited from 3 *Term Rep.* 507, has nothing to do with the Bankrupt law. FEBRUARY,  
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There is no more hardship in allowing the set-off against the assignee in this case, than in that of *Norton v. Rose*, 2 *Wash.* 233—255. Ritchie & Wales  
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February 4th, 1817, Judge ROANE pronounced the following opinion of the Court.

These are two actions, brought by the Appellee, as assignee of *Chalmers and Co.*, of two promissory Notes, against the Appellants. The Notes having been protested, actions were brought thereupon, and were, by consent, tried together, on the respective pleas of "*nil debent.*" Verdicts and judgments were rendered for the Appellee in both cases.

At the trial, the Appellants offered to set off, against the two Notes aforesaid, the contents of two Bills of Exchange drawn by *Chalmers and Co.* in favour of *Ritchie*, individually, which were returned protested for non-payment; on each of which bills there were two subsequent endorsements, which had been obliterated by *Ritchie* and *Wales*. The partnership of *Ritchie* and *Wales* had been dissolved *before* the trial, but *since* the institution of the suit; and the counsel was employed to defend the company, and not either party individually. The Court, on the motion of the plaintiff, excluded the said set-off from going to the Jury; on which there was an exception, and an appeal.

The partnership, though dissolved before the trial, yet had existence for the purpose of defending the suit: and the Bills in question, being exhibited by the Appellants at the trial, are to be considered as their property, and not the property of *Ritchie* only. They were well entitled, therefore, not only to strike out the names of the subsequent endorsers, but to write over the name of *Ritchie* an assignment to themselves; or the Bills will, without such assignment, be considered as their property, by their holding them and having it in their power to make it.

As against *Chalmers and Co.*, therefore, they would have had a right to discount them at the trial, (*whensoever they may have been acquired*;) such being the settled law of this country. But this action is brought by their assignee; and the law is,

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in case of assignments, that the assignee shall allow all just discounts, not only against himself, but also against the assignor before notice of the assignment was given to the defendant.

Although these Bills are to be taken as being the property of the Appellants, as at the time of the trial, (for the reasons already assigned,) they are not to be so considered in relation to the time of the defendants' receiving notice of the assignment, which in this case was, (at least,) that of the institution of the suit; at which time, it does not *appear* that these Bills were the property of the Appellants, or even of *Ritchie* himself, but may have been the property of one of the subsequent endorsees.

This view of the case is decisive of the question, unless, in this action against a company we are authorized to allow a set-off of a debt due to an individual partner. The law is too strongly settled in the negative, and has been too often recognized by this Court, to authorize us to do it, admitting that, as an original question, it ought to have been otherwise settled, which the Court is by no means prepared to admit. On these grounds the judgment of the Superior Court is to be affirmed.

Decided, Feb.  
 7th, 1817.

### *Graham against Call, Executor of Means.*

1. If an agreement for sale of land, be made subject to a condition, that the price thereof shall afterwards be ascertained by the parties; and one of the parties die, without agreeing upon the price; such agreement is too incomplete and uncertain to be carried into execution by a Court of Equity.

THE controversy in this case turned upon the question, whether a contract for sale of part of a lot in the city of Richmond, by *Graham* to *Means* was so complete, and binding on the parties, that a Court of Equity should enforce it on a Bill for specific performance.

The Bill was filed by *Daniel Call* executor and devisee in trust of *Robert Means*, deceased, against *John Graham*, stating that, on the 12th of October, 1803, the defendant, for the sum of 200*l.* current money, sold to the said *Means* a specified part of Lot No. 375, and put him in possession; that *Means* paid the purchase money, and commenced building a house on the lot; that, on the 29th day of March, 1808, the said *Graham* made a farther sale to him of the residue of the same lot; as by

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an account, signed by the parties respectively, would appear; but the price thereof was not extended in the said account, and therefore the plaintiff was compelled to ask a discovery in relation thereto; that the said *Robert Means* took possession also of the last mentioned piece of ground, and, since his death, the plaintiff had paid the taxes on it; but the defendant had not yet made conveyances for the said pieces of land. The prayer of the Bill, was that the same might be sold agreeably to the directions of the Will of the Testator; that *Graham* might be ordered to convey them to the purchaser or purchasers; and for general relief.

The defendant by his answer admitted that he was bound to convey, with *special* warranty, (averring that such was the agreement,) the first mentioned part of the lot; but, as to the last, contended that no *contract* was made, as no price was agreed on, nor any mode adopted to fix the price; admitting, as appeared by a certificate, signed by *Means* at the foot of the account, as well as by his own entry therein, dated March 29th, 1808, that he had agreed to let him have it; but alleging, as appeared by the same certificate, that the price was to be *thereafter agreed on; which never was done*, in consequence of the death of *Means* in a short time afterwards. The Respondent had no knowledge, nor did he believe that any possession was ever taken by the Testator, or plaintiff.

Chancellor TAYLOR was of opinion that, "notwithstanding  
" the price of the last piece or parcel of the land, in the Bill  
" mentioned, was not fixed in the life time of the plaintiff's  
" Testator, yet the contract might be carried into effect into a  
" Court of Equity, since the value thereof might be ascertain-  
" ed, if not by the agreement of the parties, by the verdict of  
" a Jury." He therefore decreed, "that the plaintiff do ex-  
" pose to sale at public auction, for ready money, the two,  
" pieces or parcels of land in the Bill mentioned, after giving  
" thirty days notice in one or more of the Richmond newspa-  
" pers; that the defendant do execute a Deed or Deeds to the  
" purchaser or purchasers for the same with general warranty;  
" that the plaintiff hold the proceeds of the piece or parcel of  
" land, on which no price was fixed as aforesaid, in his hands,  
" subject to the future order of the Court; and that he make a  
" report of his proceedings herein."



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Afterwards, upon a Report accordingly made and approved by the Chancellor, he farther decreed, that a Jury be empannelled before the Hustings Court of the City of Richmond, to ascertain what, on the 29th day of March, 1808, was the value of the said piece of lot, No. 375, sold by the defendant to the plaintiff's Testator on that day; and, it appearing by the Report aforesaid, that the defendant *John Graham* was the purchaser at the sale of those parts of the lot, the price of which was not extended as before mentioned, and that the said *Graham* was to pay 3700 dollars agreeably to his purchase; and the Jury having by their verdict fixed the value of the same, as of the 29th of March, 1808, at 1250 dollars, which, with interest to the day of sale, amounted to 1646 dollars and 45 cents, leaving a balance due from the defendant to the plaintiff of 2053 dollars, and 55 cents, with interest from the day of sale; the Chancellor farther decreed, that the defendant (who had retained the same in his hands with the consent of the plaintiff) pay to the said plaintiff the said last mentioned sum, with legal interest thereon from the day of sale; and that each party pay the costs of this suit, agreeably to their respective interests in the subject.

To this decree the defendant obtained a Writ of *Supersedeas* from a Judge of this Court; assigning error, that the Court of Chancery ought not to have directed an issue to ascertain the value of the parts of Lot No. 375, nor finally to have decreed in favour of the plaintiff as to the same; but should have dismissed the Bill as it related thereto; because no possession was ever delivered thereof to the plaintiff's Testator, and nothing was ever done in execution of the agreement; and the said agreement was too vague, incomplete and uncertain, to warrant a specific performance thereof, as the price was not fixed thereby; and the substitution of a Jury to ascertain it was a departure from the agreement, by which the parties reserved to themselves the right of agreeing upon the price. The petitioner, too, was advised that no inference unfavourable to him ought to be drawn from the sale, and from his purchasing thereat; because it was, after contesting the case, and a decree deciding the question against him; and because, being himself the purchaser, the parties could be put in *statu quo*.

*Bouldin*, for the Appellant, argued to the same effect, with the petition for the Supersedeas; and cited the following authorities; *Bromley v. Jefferies*, 2 Vern. 415; *Buxton v. Lister*, 3 Atk. 386; *Mosely v. Virgin*, 3 Vesey jr. 184; and *Milnes v. Gery*, 14 Vesey jr. 407.

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*Wickham contra*, insisted that the note of the agreement between *Graham* and *Means* evidenced a complete agreement, for the sale by the former, and purchase by the latter, for the fair and reasonable price of the property at the date of the contract. And he likened the case to a sale of property upon a fair valuation, or to the common case of a *quantum valebat* for goods sold: though the price be not agreed on at the time of delivery, yet there is a sale, and the price will be fixed by a Jury. The case cited last from *Vesey jr.* is not like the present: that case turned on the circumstance, that the parties had provided a *specified* mode for fixing the price by *arbitrators*; and the Master of the Rolls expressly says, that the case had been different, if the price had been agreed to be fixed by a *fair* valuation, without providing any particular mode of making it; and *that* is substantially the present case. The parties certainly meant to conclude a contract for the sale of the property, leaving the price only at large; and, if so, the price was not to be fixed by the caprice, or pleasure, or iniquity of the vendor, but by his justice; which brings this case within the *arbitrium boni viri*.

*William Hay, jr. in reply.* The foundation of the argument for the Appellee, is that this is an executed, and not merely an executory contract. Executed, in what way? By delivery of the possession? The answer denies it, and being in this respect responsive to the Bill, and uncontradicted by evidence, (for there is none in the cause,) is conclusive. There is nothing else, which could be said to be done in execution of the contract, but the conveyance, and payment of the purchase money: and it is not pretended that these acts were done. The claims of the Appellee then rest upon the agreement alone; and cannot be supported; as it contains a condition that the price shall be fixed by the parties themselves, precedent to the further execution of the contract; which condition was not

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performed, and, in consequence of the death of one of them cannot be performed.

The cases of *Milnes v. Gery*, 14 *Vesey jr.* 407, (cited by Mr. Bouldin,) and *Blundell v. Bretlarch*, 17 *Vesey jr.* 243, are conclusive authorities, not only that *price* is an essential part of the contract, but that if the mode, designated by the parties for fixing it, has failed by accident, a Court of Equity cannot substitute any other. If it did, it would execute no agreement of the parties, but would make one for them. It is said, however, that in *Milnes v. Gery*, there was a specific mode, but here there is none; that the words, "hereafter to be agreed upon," mean nothing more than that a fair and just mode should be adopted upon fair and just principles. The admission that there is *no mode pointed out* for fixing the price, is an answer to the Appellee's claim; for, price being essential, if it be not fixed, and no mode be designated, by which it can be fixed, the Court cannot substitute one. But the construction, contended for, is surely not the correct one: the words clearly import that the *parties themselves* are to fix the price. If not; by whom, and in what manner is it to be fixed? It is inconceivable that the contract would have been left vague and uncertain in these respects, if any other mode, than the one we contend for had been intended. If so, this very uncertainty is a bar to the execution.

There is no analogy (as supposed by Mr. Wickham,) between this case, and the recovery at law upon a *quantum valdebat* for goods sold and delivered. In that case, the contract is executed by the delivery of the goods, and there is an absence of all stipulations as to the price. Here it is executed in no way; and there is a positive stipulation as to price; viz., that it shall be fixed by the parties.

It may not be *universally* true, that a Court of Equity will not decree a specific execution in a case, in which damages at law could not be recovered; but, as a *general* proposition, it is certainly correct. How then would the Appellee stand in a Court of Law? There is no form of action, by which he could possibly recover. And the Appellant would be equally without remedy. In proceeding upon the express contract, the same obstacle would prevent a recovery on the part of either, as it would be necessary to aver and prove performance of the

condition, precedent, or that performance was prevented by the other party; neither of which is pretended. *Indebitatus assumpsit* for the price, on the part of the Appellant, upon the implication of law, growing out of the execution of the contract, would be out of the question; for it was not executed.

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February 7th, 1817, Judge ROANE pronounced the Court's opinion.

The Court is of opinion that, although the Appellant and the Testator of the Appellee had, the one agreed to sell, and the other to buy, the lot in controversy, such agreement was subject to a condition (by the express admission of the last mentioned party, at the foot of the account among the proceedings,) that the price thereof was to be thereafter agreed upon by and between the said parties respectively: and the said price having never been so agreed upon by them; and it being now rendered impossible by the death of the Appellee's Testator; the Court is of opinion that the said agreement was not so complete and perfected an one, as that it should be carried into execution by a Court of Equity, even if the possession of the said lot had been delivered to the said Testator, in pursuance thereof, which is not shewn to have been done. The Decree is therefore to be reversed, with Costs, and the Bill dismissed, so far as it claims a conveyance of the said lot, and the note taken from the Appellant for the amount of the purchase money thereof, is to be delivered up to him to be cancelled; that the Appellant pay the Costs in the Court of Chancery expended, except those arising from the sale of the lots in the Bill mentioned; and that the residue of the said Decree is to be affirmed.

Stowers, Administrator of Bragg against Smith's  
Executrix.

Decided February 7th, 1817.

THE Appellee moved the Superior Court of Richmond County, on the 19th of April, 1815, for Judgment against the High Sheriff against his Deputy, to recover the amount of a Judgment, rendered by a County Court, against the former, as having been obtained for the default and misconduct of the latter, 1. It is sufficient evidence, in support of a motion by a

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 Appellant as Administrator of *William Bragg*, who had been the Deputy of her Testator *Charles Smith*, late Sheriff of Richmond County, for the amount of a Judgment obtained against the said *Smith*, in his lifetime, by one *Benjamin Branhaw*, for the default and misconduct of the said *Bragg*, acting as the Deputy Sheriff of *Smith*.

To support the motion, (legal notice being confessed,) the plaintiff gave in evidence the record of an action of Debt on a Tobacco Bond, dated the 21st of November, 1791 in behalf of *Branham* against *Peter Rust*; by which it appeared that the Writ in that case, (which issued from the Clerk's office of the County Court of Richmond,) requiring Bail, came to the hands of *Bragg*, who returned as Bail one *Clement Shackleford*, to whom the plaintiff excepted in the Clerk's office on the second Rule day after the return of the Writ; (see 1 R. C. ch. 67. § 21, p. 88.) on which day he filed his Declaration against *Rust*, and a common Order was entered against the defendant and Sheriff, which, at the next rule day, was confirmed: at the ensuing quarterly term, *without any decision by the Court concerning the sufficiency of the Bail*, this entry was made, "at a Court, &c. came as well the plaintiff aforesaid, by his Attorney, as the defendant by *Foushee G. Tobbs* his Attorney, and, on the motion of the said defendant, the Office Judgment, obtained by the plaintiff against him and Sheriff, is ordered to be set aside, and thereupon *Charles Smith, Sheriff, defends, &c.* and pleads payment," &c. Judgment was obtained, by *non sum informatus*, on the 6th of November, 1805, against *Smith*, Execution issued, a forthcoming Bond given by him on the 1st of January, 1806, and Judgment

if it be proved, by the Record, that appearance Bail, taken by the Deputy Sheriff, was excepted to in the Clerk's office, and, at the ensuing quarterly Court, (without any decision by the Court as to the sufficiency of the Bail,) an Office Judgment against the defendant and Sheriff was set aside, payment being pleaded in the name of the High Sheriff, after which a final Judgment was rendered by *non sum informatus*; and by the parol testimony of the Counsel that he set aside the Office Judgment at the instance of the Deputy Sheriff and had no communication with the High Sheriff during the pendency of the suit.

2. A High Sheriff, against whom a Judgment is rendered for the default or misconduct of his Deputy, is entitled to recover of such Deputy, not only the amount of the original Judgment, but all additions thereto arising from Coroner's Commissions included in a forthcoming Bond, Costs of a Judgment on that Bond, and Costs and Damages on Appeals, or Writs of *Supercedas*, until its final affirmance by the Court of Appeals.

3. But a Judgment in his favour against the Deputy, if rendered for more Damages than have been recovered against himself, ought to be reversed with Costs.

rendered thereupon; a Writ of *Supersedeas* was obtained from the Superior Court of Richmond County, where, on the 16th of April, 1811, a Judgment was rendered, affirming the original Judgment, (1) and reversing that on the forthcoming Bond, because it had been rendered for the Debt with Interest at the rate of six per cent., instead of five per cent.; (a) but entering a Judgment corresponding with that opinion: an Appeal was taken to the Court of Appeals, where (the Appellant not appearing,) the Court affirmed the Judgment, on the 20th of October 1813, which Judgment of affirmance was received and recorded by the Clerk of the Superior Court of Law January 29th 1814.

The plaintiff, also, in support of her motion, proved that *Charles Smith* was the plaintiff's Testator, and *William Bragg* the defendant's Intestate; and, "by the Counsel of *Peter Rust* in the said Record mentioned, that he had set aside the Office Judgment against the said *Rust* and *Smith* at the instance of the aforesaid *W. Bragg*, as well as he remembered, and that, during the pendency of the suit between *Brankham* and *Rust*, he never had any communication with the said *Smith*."

This was all the evidence in the cause, which was spread on the record on the defendant's motion. The Superior Court of Richmond County gave Judgment, in favour of the plaintiff, "for 17,246 lbs. of new inspected Crop Tobacco, and Casks, with 2l. 6s. 11d. Cash, with Interest thereon at 5 per centum per annum, from the 1st day of January 1806 to the 16th day of April 1811, and from the 29th day of January, 1814, 'till paid, and \$4 56 cents, and \$4 96 cents, Costs, and 4,804 lbs. of like Tobacco and Casks, and 1l. 9s. 0, damages, and \$20 22 cents, Costs; being the amount of the said Judgment, and also her Costs by her about her motion in this behalf expended; to be levied, &c.;" including, not only the amount of the original recovery against *Smith* the Sheriff, but all the subsequent additions of Coroner's Commissions, Damages and Costs.

(1) Note. The *Supersedeas* which issued from the Superior Court to the County Court mentioned only the Judgment on the forthcoming Bond; yet the Record from the Superior Court stated that the transcript of the Record of both Judgments was there seen and inspected. \* See *Ward v. Johnston*, 1 Munf. 45. pl. 6.

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(a) See *Brook  
Roana, 1 Call,*  
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To this Judgment the defendant obtained a *Superseas* from a Judge of this Court.

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*Parker for the Appellant.* The evidence in this case did not prove any default or misconduct on the part of the Deputy Sheriff Bragg; without proving which, no Judgment should have been rendered against his Administrator. Under the Act of Assembly, the Sheriff is made responsible, only in case the Bail shall be "*adjudged insufficient by the Court.*" (a) A mere exception to the Bail is not enough. If the objection is made in Court, it is forthwith to be determined there; if in the Clerk's Office, the District Court Law directed the decision to be by the Court at the next term; (b) and the 26th section of the County Court Law (c) gives the same power to the County Courts at the quarterly terms. These clauses prove incontestably that, before the liability of the Sheriff commences, the Court must *adjudge the Bail insufficient.*

(d) *Stuart v. Hamilton, 2 H. and M. 43.*

It should be recollected that, but for these Acts, the Sheriff would not have been liable at all in the manner thereby prescribed, but the plaintiff would have been driven to his action on the case. They give a new and summary remedy, and therefore must be taken strictly. (d) This Record only proves that the Bail was excepted to. Did that make the Sheriff liable? Does that establish the default or misconduct of Bragg? If a *different* remedy had been pursued, the plaintiff must have alleged in his Declaration, and proved the insufficiency of the Bail. But here the insufficiency is *inferred* merely from an exception taken, and a remedy is pursued, to which the Sheriff is liable, only where the Court has *adjudged* it. The default and misconduct of Bragg is attempted to be shewn by no other evidence; and surely this does not support it. But, unless the *default* or *misconduct* of the Deputy be shewn, the High Sheriff has no remedy by motion. (e)

(e) 1 R. C. ch. 161. p. 314.

(f) *Drew v. Anderson, 1 Call 51.*

The Deputy Sheriff is not bound by an *erroneous* Judgment against the High Sheriff; (f) even though it should appear to have been rendered on account of some *alleged* default on the part of the Deputy. It may be said, that, because the Judgment was affirmed by the Court of Appeals, I am precluded from questioning it. But, without questioning the principle that, where a Court of competent jurisdiction has decided, its

Judgment must stand until reversed by an Appellate Court, or the propriety of the decision of this Court in *Hose v. Tebbs and wife*, 1 *Munf.* 501, I may contend that *Bragg's* representative is not bound by the Judgment against the High Sheriff in this case; because the point, as to the misconduct of the Deputy Sheriff, was never presented by the Record. The High Sheriff merely pleaded "*payment*," without insisting on the sufficiency of the Bail. The question concerning that sufficiency has never been determined by any Court. The Judgment against the High Sheriff was obtained by his own fault, in unnecessarily making himself a defendant and pleading *payment*.

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The testimony of *Foushee G. Tebbs*, the Counsel, who set aside the Office Judgment, does not prove any default or misconduct on the part of *Bragg*. If that Witness is to be understood as saying that he was Counsel for *Bragg*, he is contradicted by the Record, which states that he was Counsel for *Peter Rust*; and, if he was *Bragg's* Counsel, his testimony is not admissible against him, according to the decision of the Special Court of Appeals in *Parker v. Carter and others*, 4 *Munf.* 273. If he was not *Bragg's* Counsel, but only spoken to by him in behalf of *Rust* or *Smith*, this act of *Bragg* could not have operated an injury to *Smith*, whose duty it was to attend to the suit. *Bragg* could not have inferred that the Office Judgment was on account of any default of his; for he was not a defendant to the suit: and if he made an improper defence, his doing so did not constitute a default or misconduct in his office of Deputy Sheriff; for which alone he could be made responsible on a *motion* by the High Sheriff. But the Record proves that not *Bragg*, but the *defendant* set aside the Office Judgment; and, as the *defendant* appeared, the proceedings against the Sheriff ought to have been set aside. (a)

(a) *Appx. to 3  
Tuck. Bl. p. 49.*

2. The estate of the Deputy Sheriff ought not to be burdened with the Costs and Damages, incurred by the *Superseas* and Appeal taken by the High Sheriff. The Deputy cannot, where there is error, compel the High Sheriff to appeal for his *benefit*: he ought not therefore to be liable for the consequences of an Appeal taken to his *injury*. At all events, the Appeal ought to appear to have been taken with *good faith*, for his *benefit*, and *duly prosecuted* by the High Sheriff. But this case presents peculiar circumstances. The point



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alone he could have appealed, was waived by Smith's plea. He brought up the Appeal on the *forthcoming Bond*, and not on the *original* Judgment. The Judgment appealed from did not involve any point interesting to the Deputy Sheriff; and even the Appeal on that Judgment was abandoned by the High Sheriff.

*Upshur contra.* The original Judgment, as well as that on the forthcoming Bond, was examined by the Superior Court of Law, which expressly affirmed the original Judgment; and therefore this Court, in *affirming* the Judgment of the Superior Court, must have determined that that Court had, properly, *both* Judgments before it, and had correctly determined as to both. The case of *Smith v. Brankham* could have been decided here upon no other ground, than this, that *Bragg* had taken insufficient Bail. The Judgment it is true was against *Smith*; because the High Sheriff is alone responsible to the party injured; (a) but his remedy over is against the Deputy.

(a) *White v Johnson*, 1 Wash. 159; *Armistead v. Marks and Saunders*, *Ibid.* 325.

The plea of payment was never put in by *Smith* at all; but by *Bragg*. It was his own act, and, in itself, a default to our injury. The custom of the country is, that the Deputy, being ultimately responsible, always attends to such suits: the High Sheriff, relying on his remedy against him, does not interfere. That such was the fact in this case, is proved by the evidence of *Foushee G. Tebbs*, which does not contradict the record, but merely explains it; and parol testimony is admissible in a case of this sort. (b) *Bragg* is therefore responsible for any

(b) *Shelton and others v Ward*, 1 Call, 538.

loss occasioned by the mispleading. It was in his power to have had a decision of the Court upon the sufficiency of the Bail; but as he did not, and pleaded payment without such decision, it was an admission, on his part, that the Bail was insufficient; after which, he is estopped from denying it.

*Parker in reply.* In *Shelton v. Ward*, the point decided was, that parol evidence is admissible to supply a *defect* in the record, but not to *contradict* it: to state *additional* facts, but *not opposite*. *Bragg* was not obliged to defend the suit at all: neither is there any thing in the law to shew that he had a right to defend it.

The High Sheriff could not be made a defendant, by the plaintiff, until the Court had adjudged the Bail insufficient.

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1817.

Stowers, Adm'r.  
of Bragg  
v.  
Smith's Ex'trix.

February 7th, 1817, Judge ROANE pronounced the Court's opinion.

The Court is of opinion, that the Judgment of the Superior Court of Law is erroneous in this, that, as to the Damages, pending the Appeal in the proceedings mentioned, the Judgment is entered for a sum *in gross*; instead of pursuing the Judgment entered against the Testator of the Appellee, so as to give her the full amount of the Judgment recovered against her Testator, and no more; and, although this Court would not have reversed said Judgment for this defect in form, if, in point of fact, the Damages, as calculated, and for which Judgment was rendered, had amounted to no more, than would have been recovered had the Judgment been pursued as aforesaid; yet, there being an error in the amount of Damages, for which the said Judgment is rendered against the Appellant, the said Judgment is reversed with Costs: and this Court proceeding, &c. it is considered by the Court that the Appellee recover against the Appellant 34,492 lbs. of new inspected Crop Tobacco, and Casks, and 4*l.* 13*s.* 10*d.* Cash, and her Costs, as well in the Superior Court as in the Court of Appeals, expended: but this Judgment may be discharged by the payment of 17,246 lbs. of like inspected Tobacco, and Casks, with Interest thereon at five per centum per annum from the 1st day of January 1806, 'till the 16th day of April 1811, and from the 29th day of January 1814, 'till paid, with 2*l.* 6*s.* 11*d.* Cash, and Damages at the rate of ten per centum per annum, on the principal sum and Costs in the Superior Court of Law aforesaid, from the 16th of April 1811, until the 29th day of January, 1814, for retarding the execution of said Judgment, pending the Appeal aforesaid.

### Lee and Fitzhugh against Chilton.

Decided February 7th, 1817.

A writ of *scire facias* was issued from the Clerk's office of Spottsylvania County, directed to the Sheriff thereof, on the Sheriff that the defendant is no inhabitant of his Bailiwick, and is not found within the same, is

1. On a Writ of *Scire facias* against Bail, a return by the

FEBRUARY, 17th of February 1813, in behalf of *John Chilton* against *M'Carty Fitzhugh* and *Henry Lee, jr.* as special Bail for *Henry Lee, sen'r.* The Sheriff's return was, "The within-named *M'Carty Fitzhugh* and *Henry Lee, jr.* are not inhabitants of my bailiwick, and are not found within the same." An *alias* writ of *scire facias* was issued, and directed in like manner, "on the 17th of April; on which writ the Sheriff's return was, "no inhabitants of my bailiwick, and not found." At Rules in the Clerk's office in June, a common order was entered against the defendants, which in July was confirmed. At August Term, the defendants, appearing by Counsel, pleaded "payment, and no such Record;" and thereupon the Office Judgment was set aside. At November Term, "it appearing to the Court that the Counsel for the defendants had *improvidently pleaded* in this cause," leave was given him to "withdraw the said pleas, which he accordingly did; whereupon, "the plaintiff moved the Court to permit the Sheriff to *amend his return of the Scire facias's* by stating that the defendant had nothing in his bailiwick, by which they could be summoned; which the Court accordingly ordered; whereupon the Sheriff amended his said returns; and it appearing to the Court that the defendants, at the time of issuing the first *Scire facias*, were, and ever since had remained, out of the Commonwealth of Virginia," Judgment was immediately entered against them.

*Lee & Fitzhugh*  
v.  
*Chilton.*

To this Judgment a Writ of *Supersedeas* was awarded by a Judge of the General Court; the error alleged in the Petition being that the Court had entered Judgment against the *special Bail* on the return of two *Scire facias's nihil*, contrary to the Acts of Assembly directing the mode of serving Writs of *Scire facias*, 1 R. C. ch. 231. p. 379; and ch. 67. § 30. p. 89. The Judgment being affirmed by the Superior Court of Law, the defendants obtained a Writ of *Supersedeas* from a Judge of this Court.

not a sufficient return of *nihil*: but it should be stated, also, that he has nothing in the bailiwick, by which he could be summoned.

2. If two Writs of *Scire facias* be successively issued; the returns on which are both defective; and the defendant, after pleading specially, obtain leave to withdraw his plea, as having been improvidently pleaded; the Court ought not thereupon to permit the Sheriff to amend both his returns, but only that on the first Writ; quashing the second Writ, and remanding the cause to the Rules for farther proceedings.

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1817.

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Chilton.

*Wickham for the plaintiffs in error.* It may be questioned; but I conceive this case is within the provisions of the Act concerning the service of Writs of *Scire facias*, 1 R. C. ch. 67. § 30. p. 89; and that the Sheriff's return is still defective. The only part of the return, which is proper at the common law, is that introduced by the amendment. Under the Acts of Assembly, actual service on the defendant or his *Agent* is necessary to authorize a return of the *Scire facias* executed; and to constitute a good return of *nihil*, where the defendant does not reside in the county, it should be stated that he is absent from the Commonwealth and *has no known Attorney* within the same. This should have appeared by the *Return itself* and not by *parol testimony*. Where a negative as well as affirmative proposition is necessary, as the foundation of the proceedings, both must be stated.

But, if the Court had the right to hear testimony, the grounds they went upon were insufficient; for it should have appeared that the defendants had no known Attorney within the Commonwealth.

The Pleas being withdrawn, not on the ground of *no defence*, but that the defendants had *improvidently* pleaded, the cause should have been sent to the rules, farther time allowed to plead, and, in case of failure, Judgment entered by *nil dicat*. The Court therefore erred in entering Judgment *immediately*.

*Parker contra.* A party who withdraws his plea, stands precisely in the same situation as one who has appeared and not pleaded. In both cases, Judgment may be entered by *nil dicat*. When the plea is withdrawn, there is no necessity of another Rule to plead. If there were, the same proceedings might eternally be repeated. If the defendants intended to object to the return of the *Scire facias*, they should have pleaded in abatement, or moved to quash it.

Notwithstanding the Acts of Assembly concerning the service of Writs of *Scire facias*, Judgment may be entered against *special bail* upon two such Writs returned *nihil* (a) The Act (a) 1 R. C. ch. 66. § 31. p. 79. which says that "no Judgment shall be rendered on the re-  
"turn of two *nihilis*, unless the defendant reside in the County

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(a) 1 R. C. ch.  
87. § 30. p. 89.  
(b) *Ibid.* ch.  
231. p. 379.

"wealth, and have no known Attorney within the same," (a) applies only to Writs of *Scire facias* "for renewal of Judgments." That of January 1798 (b) does not say that the mode of service therein pointed out shall be the *only* one, but that the service so directed shall be *sufficient*. The return, however, that the defendant is *not found*, is *no inhabitant* of the Sheriff's Bailiwick, and has *nothing* therein, by which he could be summoned, is a sufficient return of *nihil* under that Act, as well as at common law.

The leave, granted the Sheriff to amend his return, makes no difference in the case. According to *Baird v. Rice*, 1 Call 24, 25. and *Bullitt's Executors v. Winstons*, 1 Munf. 269., his omission to make the proper return did not affect the justice of the case, or alter the rights of the parties, which must be considered, as if the return as amended had been made in the first instance.

*Wickham* in reply. The return on the *first Scire facias* should have been *nihil*. The return actually made did not warrant the issuing of the second *Scire facias*. The amendment of *both* returns *at once* was improper. If admissible, it would make the *second Scire facias* good by matter *ex post facto*. The course should have been to amend the return on the *first* Writ, and then issue *another*. *Baird v. Rice* was a case in *Equity*, in which the Court proceeded on the ground that Equity will consider that as done, which ought to be done. *Bullitt's ex'ors. v. Winston* is not like the present case. We should have had a day to answer the amended return; and also *farther time to produce the body of our Principal*. Upon the amendment, the cause should have been sent to the Rules for a new common order, or rather for a new *Scire facias* to be issued.

February 7th, 1817. Judge ROANE pronounced the Court's opinion.

The Court is of opinion that the Judgment of the County Court is erroneous in this; that, at the time the defendants had leave to withdraw their pleas, as having been improvidently pleaded, they had the right to surrender their principal;

two writs of *Scire facias* not having been then returned *nihil* against them; that the permission given to the Sheriff to amend his returns could not, by relation to the time, when those returns were made, deprive them of the benefit of two several writs returned *nihil*; for, until such writs were severally issued, and so returned, with a proper interval between each, they had a right to make such surrender. The Judgment of the Superior Court of Law, affirming that of the County Court, is therefore erroneous, and reversed with costs; and this Court proceeding, &c. the Judgment of the County Court is also reversed, with Costs, as far back as the order permitting the Sheriff to amend his return; which Order is also reversed so far as it permits an amendment of the return on the second writ of *scire facias*; and the said last mentioned Writ, with the return thereon, is quashed, and the cause remanded to the rules to be farther proceeded in.

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1817.  
Lee & Fitzhugh  
v.  
Chilton.

### Dust against Conrod and others.

Decided, Feb.  
8th, 1817.

UPON a Writ of Supersedeas, to a Decree of the Superior Court of Chancery holden at Winchester, the Record presented the following case.

*Daniel Conrod* being security for his brother *Frederick Conrod*, in a forthcoming bond for the sum of five hundred dollars, the latter, on the 9th of September, 1800, executed an instrument intended to operate as a mortgage, to the former, of sundry slaves; a condition being inserted, that, if the sum therein

1. In a suit against the vendee of a slave, if he refer the controversy to arbitration, without being authorised to do so by the vendor who had bought and sold the slave *bona fide*, and when he might have cast

the plaintiff in the ordinary course of law, he has no remedy in equity against such vendor, in the event of his losing the slave by an award.

2. A mortgage being attested by one witness only, and therefore defective; (see 1 R. C. ch. 90, § 1. 4. p. 157;) yet, if the mortgagee has recovered upon it at law, a Court of Equity will not regard the defect.

3. If the mortgagee of a slave recover him in detinue against a person claiming under a *bona fide* purchaser from the mortgagor; Equity will consider such person, as standing in the place of the mortgagor, and entitled to redeem the slave by paying the debt.

4. It will, also, at the same time, (to make an end of the controversy,) give him relief against the mortgagor, who sold the slave with warranty of the title.

5. In such case, the right of the derivative purchaser to redeem the slave, and to relief against the mortgagor, who improperly sold him, is not affected by his having submitted to arbitration, the suit brought against him by the mortgagee.

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1817.

*Dust*  
v.  
*Conrod & al.*

expressed was not amply satisfied by the 10th of October ensuing, or sooner, if legally demanded, then the slaves, so made over, should be exposed to public sale; the money arising therefrom to go towards paying the debt, and the balance to be returned to said *Frederick Conrod*. This instrument was attested by *one witness* only, and recorded on his testimony, the 8th of April, 1801. The slaves having remained in the mortgagor's possession, one of them, on the 2d October, 1800, was sold at public auction, as his property, (after being advertised as such,) at *Winchester*, where both the brothers resided, and bought by *Michael M'Kewan*, a bona fide purchaser, without notice of the mortgage, who afterwards sold him to *Valentine Dust*, against whom an action of Detinue was brought by *Daniel Conrod*, the mortgagee. Pending that action, the parties referred the subject in controversy to arbitrators, who, in April, 1804, made an award in favour of the plaintiff, upon which he recovered the slave. *M'Kewan* having sued *Dust* on his bond for purchase money, and obtained Judgment, the latter filed his bill in the Superior Court of Chancery, (making *M'Kewan* and both the *Conrods* defendants,) praying that *Daniel Conrod* should answer particularly, whether a bona fide possession of the slave was ever delivered to him by his brother; (1) whether he had not notice of the sale on the 2d of October, 1800, previous thereto, or afterwards, and at what time; whether the said sale was, or was not, intended for his benefit; and was not made, either at his suggestion, or with his knowledge, to pay off and discharge the forthcoming bond; that *M'Kewan* should be enjoined from farther proceeding on his Judgment; and for general relief.

The Complainant alleged that *Daniel Conrod's* title was defective at law, the mortgage being attested by *one witness only*; that the Award was obtained by surprize, in the absence of his witnesses and counsel, (who by sickness was prevented from attending,) and was founded on a mistake of the Arbitrators in point of law, though such mistake did not appear on its face, the grounds and reasons of the Award not being stated therein; that, even if *Daniel Conrod's* legal title were indis-

(1) Note. That such possession was never delivered, was, by evident implication, though not expressly, admitted in *Daniel Conrod's* answer.

putable, a Court of Equity ought not to permit him to avail himself of it, or of any advantage he had gained at law, because he had quietly suffered *M'Kewan*, and afterwards the complainant, to purchase the slave, without informing them of his title, though he had full notice of the said *M'Kewan's* claim.

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1817.

Dunst  
v.  
Conrod & al.

No answer was filed by *Frederick Conrod*, who, it seems, had left the state, and was said to be insolvent. An attachment was issued against him, the return on which was not stated; and no farther proceedings, to compel him to an answer, appeared in the Record. *Daniel Conrod* filed a Demurrer, Plea and Answer; *demurring* to so much of the Bill as questioned his *legal* title to the slave; because that title had been established by the judgment of a Court of Law, and was not to be re-examined by a Court of Equity; *pleading* the Award of the Arbitrators, and its affirmance by the Court to which it was returned, in bar to a new trial of the action of Detinue; and *answering*, that the Award had not been obtained by surprize, but with every opportunity of a fair hearing of the Complainant, (who was *present*,) and of any testimony he might have been disposed to adduce; that the sale of October 2d, 1800, was *not made* at the *suggestion*, or *with the knowledge or consent* of the Respondent; that he had no knowledge thereof until long afterwards; the precise time not recollected; and that the proceeds, if any payment was ever made by *M'Kewan*, were never applied towards the discharge of the forthcoming bond, nor in any manner whatsoever to the benefit or relief of the Respondent; that the debt had totally fallen upon himself, most of which he had paid out of his own pocket, and that the property, conveyed to him as aforesaid, was entirely insufficient for his indemnification; denying, also, all the charges of fraud on his part.

*Michael M'Kewan*, (among other allegations) in his Answer, insisted that it was an improper act in the Complainant to take the action of Detinue out of the usual course of proceedings at law, by leaving it to Arbitration; in doing which, he did not consult or advise with him, (*M'Kewan*;) that if he had been consulted, he never would have consented to that measure; and it was very clear that, if a trial had taken place in a Court of Law before a Jury, where the aid of counsel would have been had, the Bill of Sale, under which *Daniel Conrod* claimed and recovered the slave, would not have been permit-



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ted to go to the Jury, as conclusive evidence of title, without proof of a real and bona fide sale and possession passing therewith; the contrary of which could have been proved.

By order of the Chancellor, a Commissioner reported, that the value of the slaves, mentioned in the mortgage from *Frederick* to *Daniel Conrod*, was, at the date thereof, \$1100; that *Harry*, the slave in controversy, was worth \$200; that *Daniel Conrod*, and after his death his administrator, had paid in all, the sum of \$644 99, on account of the debt, for which he was security for *Frederick Conrod*; and that a balance remained due of \$207 49, for which his estate was liable. It appeared by the Bill of Sale from *Frederick Conrod* to *M'Kewen*, that *Harry* was sold to him for the sum of seventy-one pounds, and *Frederick Conrod* warranted the title against all persons whatsoever. It farther appeared by the Commissioner's Report, that the other slaves in the mortgage were given up, or sold, to *Adam King*, agent for *Benjamin B. Morris*, for another debt, due from the said *Frederick Conrod* and a certain *Robert M'Nun*, and were taken to Philadelphia; and that, since the death of *Daniel Conrod*, *Harry* had been sold, by his administrator, to *David Holmes*, Esq.

No depositions were taken on either side.

On the 6th of July, Chancellor CARR decreed, that the injunction be dissolved, and the Bill dismissed with costs.

In the Petition for the *Supersedeas*, the following errors in the Decree were relied upon:

1. Though the Bill had been filed against *Frederick Conrod* among others, and never came on to be heard as to him, who never answered, but was in contempt; yet it had been dismissed *generally*, and costs awarded to the *defendants*.
2. The Award ought to have been set aside, as it was manifest that *Conrod* claimed under a defective mortgage.
3. Even if the Award, in relation to the legal title, was not to be disturbed, still *Daniel Conrod* was *only a mortgagee*; and, instead of dismissing the Bill, which had the effect of turning the mortgage into a complete title, the Chancellor should have prosecuted the inquiry to discover for what sum negro *Harry* was to remain liable under the mortgage, and directed a sale of *Harry* to satisfy such sum, and the balance to be paid to the *Complainant*; since he was clearly entitled to *Harry*; subject to

the mortgage claim which ought to have been ascertained. Moreover, there being a prayer for *general relief*, the Bill, in one aspect, was a bill to redeem; and *Frederick Conrod* should have been brought before the Court, before a final decree could be pronounced, in as much as he only was consant of the accounts between himself and his brother.

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*Leigh for the plaintiff in error.*

*No Counsel appeared on the other side.*

February 8th, 1817, Judge ROANE pronounced the Court's opinion.

The Decree is to be affirmed, so far as it dismisses the Bill as to *M'Kewan*, and to be reversed as to the residue, with the costs against *Daniel Conrod*; and the cause to be remanded, to enable the plaintiff, as standing in the place of *Frederick Conrod*, to redeem the slave in question, after paying the debt comprized in the mortgage, and for the farther purpose of proceeding against the said *Frederick Conrod*, under his warranty of the slave aforesaid.



**Crenshaw against Smith and Co.**

Decided, Feb.  
10th, 1817.

IT appeared from the Record in this case, that *Charles Crenshaw*, father of the Appellant *Nathaniel*, purchased, on the 30th of November, 1775, of *Joseph Roberts* all the lands the said *Roberts* owned or claimed in the County of Pittsylvania, among which was a tract of one hundred acres, whereof a certain *Joseph E. Hailey*, afterwards, viz. on the 12th of September, 1789, recovered possession, by the Verdict of a Jury upon a Warrant of forcible Entry and Detainer, against the said purchaser. *Roberts*, by Deed bearing date the 12th of June, 1776, had warranted the title to the said lands generally, *1. It seems,* that, where the purchase money for land, which the vendor has conveyed with warranty, has not been fully paid; and the purchaser comes into Equity for an abatement or discount, from the sum remaining due, on account of a loss by an eviction of part of the land; he should be allowed the value of the land lost, at the time of the purchase, and not at the time of the eviction. \* See note to 1 *Murf.* 338; and 1 *Murf.* 500.

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against all persons whatever. The purchase money, due on the contract, was partly paid; and two bonds on the same account, the one for 87l. 3s. 6d. and the other for 100l., payable April 1st, 1777, and April 1st, 1778, remained unpaid; which Bonds, by assignment from Roberts, and several intermediate assignments, were transferred to *James Smith and Co.* British Merchants, and, in their absence from this country during the American Revolution, were lost or mislaid.

By the last Will and Testament of *Charles Crenshaw*, dated the 9th of February, and admitted to probate the 3d of June, 1790, he devised to his son *Nathaniel Crenshaw*, the tract of land in Pittsylvania County, on which he then resided, "with a proviso, that he should pay the balance of the Bonds given to *Joseph Roberts of the said County for lands purchased of him*;" and, upon *Nathaniel Crenshaw's* failing to discharge the same, the Testator "empowered his Executors to sell the said land, or so much thereof, as would discharge the said Bonds."

A Bill in Chancery was filed by *James Smith and Co.* in the County Court of Pittsylvania, in August, 1803, against the Executors and Devisees; making also *Roberts* and the other assignors of the Bonds defendants; to set up the Bonds, so lost or mislaid, and obtain a decree for the amount. A cross-bill was exhibited by the Executors, (who were *John Crenshaw* and *Nathaniel Crenshaw*,) against *James Smith and Co.* and *Samuel Calland* their agent, to be allowed an abatement or discount for the loss of the said one hundred acres of land. *Calland*, by his answer, contended that the land recovered by *Hailey*, was not any part of the land for which the Bonds were given; alleging that the Testator's honourable anxiety, to provide by his last Will and Testament sufficient funds to pay off those Bonds, manifested this; that, had it been otherwise, he would not have directed the payment, without insisting on some deduction; and also that, in addition to the one hundred acres, and Mill, for which the Bonds aforesaid were executed, the Testator acquired of said *Roberts* an entry or entries, covering a large quantity of adjacent land; and that the land recovered by *Hailey* was a part of that adjacent land.

Both causes were removed from the County Court to the Superior Court of Chancery, by *Certiorari*, and afterwards heard together, on the Bills, Answers, Exhibits and Examina-

tions of Witnesses; on consideration whereof, Chancellor TAYLOR decreed, in the first suit, that the defendant *Nathaniel Crenshaw* pay to the plaintiffs the amount of the Bonds in question, with costs; reserving liberty to the plaintiffs to resort to the Court, if it should be necessary, to subject the land, devised by the Will to the said *Nathaniel*, to satisfy the same; and dismissed the cross-bill, with costs. From this decree, *Nathaniel Crenshaw* appealed.

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1817.

Crenshaw  
v.  
Smith and Co.

*Bouldin* for the Appellant.

*Wickham* for the Appellees.

February 10th, 1817, Judge ROANE pronounced the Court's opinion.

The Court is of opinion that the hundred acres of land in the proceedings mentioned, recovered from the Testator of the Appellant, by *Joseph E. Hailey*, formed a part of the consideration of the Bonds in controversy; and, as it at present appears that the title of the same is in the said *Hailey*, and not in the Appellant, or *Roberts*, under whom he claims, the Court is farther of opinion, that the Appellant should have credit for the value thereof, as at the time of the purchase,<sup>(1)</sup> in part satisfaction of the Bonds aforesaid; saving, however, a right to the Appellee, if he thinks proper, to make the said *Hailey*, or his representatives, parties to the cross bill of the Appellant; and if it shall be established, by the event of that suit, that the said Appellant, or those, under whom he claims, and not the said *Hailey*, or his representatives, are legally entitled to the land aforesaid, that, then and in that case, the amount aforesaid is not to be allowed.

The Decree is therefore reversed, with costs, so far as it conflicts with this opinion; and the cause is remanded, in order to be finally proceeded in pursuant to the principles above declared.

(1) Note. The point, whether the Appellant ought to have credit for the value of the land at the time of the purchase, or at the time of the eviction, was not made in the argument of this cause. It appeared by the deposition of *Jos. E. Hailey*, that the value of the 100 acres recovered by him, was, at the time of that recovery, 42l. 10s. 0d.; and that, afterwards, viz., in the year 1806, it had risen to 100l: but what the value was at the time of the purchase, did not appear.

Decided, Feb. 11th, 1817. **Hays's Executor and others against Hays and others.**

1. A Bill in Equity in behalf of persons, suing as *children* of a deceased residuary legatee for his share of the *residuum*, can not be sustained : it should appear that the plaintiffs are the Administrators, or other *legal representatives*, of such legatee.

THE Appellees, suing as *children* of *David Hays*, who was one of the residuary legatees of *Andrew Hays*, deceased, filed their Bill in the Superior Court of Chancery for the Staunton District, against *Andrew Hays*, Executor of *John Hays*, who was the acting Executor, and *Michael Hays*, *John Hays*, *Campbell Hays* and *James Hays*, the other Legatees, of the said *Andrew Hays*, deceased ; for the purpose of recovering the share to which *David Hays*, their father, was entitled. It appeared from the Bill, that *David Hays* had died intestate, and that no person had administered upon his estate. A decree being made in favour of the plaintiffs, the defendants appealed to this Court.

February 11th, 1817, Judge ROANE pronounced the Court's opinion.

" The Court is of opinion, that, as the Appellees have not sued as the *legal* representatives of *David Hays*, but only in the character of his *children*, the Decree ought to be reversed with costs, and the Bill dismissed, upon the principle, upon which the Court went, in the case of *Nelson Administrator of Walker v. Evans*." (1).

(1) Note. The case of *Nelson Administrator of Walker v. Evans*, was decided November 2d, 1816, and is similar to this ; but, in the Order Book, the reason for reversing the Decree, and dismissing the Bill in that case, is not stated. The Reporter thinks that the Court's opinion, delivered by the President, did not assign any reason for the decision : if it did, he has not been furnished with it.

Tinsley against Oliver's Administrator and Heirs, Decided, Feb. 11th, 1817.

AND

The Same against the Same.

UPON Appeals from Decrees of the Superior Court of Chancery for the Richmond District, dismissing with costs, two Bills exhibited by the Appellant; the object of which was to obtain retribution for the amount of several Judgments, on Bonds, obtained against him, and paid by him, as security for the intestate *John Oliver*; the prayer of the Bills being, that the administrator should render an account of the personal assets, and satisfy the claims of the plaintiff, as standing, in equity, in the shoes of the judgment creditors; that the other defendants should render an account of the real estate, and in case of a deficiency of the personal estate, (which was suggested as probable,) that his said claims might be charged upon the real estate, either by marshalling assets, or putting him upon the footing of a bond creditor. In one of the cases, the plaintiff appeared to have obtained a judgment at law against the administrator, but without receiving satisfaction: in the other, no motion had been made, or suit at law instituted, to recover the money paid. No objection to the jurisdiction of the Court of Equity was taken by the defendants. Chancellor TAYLOR dismissed the Bills, on the ground that, in his opinion, the plaintiff had *complete remedy at law*; but without prejudice to any suit he might be advised to bring at law.

1. A Surety in a bond, having paid to the creditor the amount of a judgment against him thereupon, may file a Bill in Equity, (without having made a motion or brought any action at law) against the administrator and heirs of the principal obligor; for the purpose of establishing his demand; of having an account of the personal and real estates; and of being permitted to stand in the place of the obligee in the Bond, so as to be paid out of the real estate, in default of the personal al.(1)

*Leigh* for the Appellant.

*Bouldin* for the Appellees.

(1) Note. By the Act of Assembly, "to empower Securities to recover damages in a summary way," (1 R. C. ch. 145,) the remedy *by motion* is given to the Security, in any note, bill or bond, his or her Executors, or Administrators, against the principal obligor, his or her Heirs, Executors or Administrators. But such remedy is not so *complete* as that in Equity, where accounts of the personal and real assets may be obtained, on oath, from the defendants.

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nistrator and  
Heirs.

February 11th, 1817, Judge ROANE pronounced the Court's opinion as follows.

The Court is of opinion that the Decrees in these cases, dismissing the Bills of the Appellant, are erroneous, the Appellant being properly in a Court of Equity, as well for the purpose of *establishing his demand* against the estate of the Appellee's intestate, in the second suit, as of having an *account* of his personal estate, and being permitted to stand in the place of the obligees in the bonds, in the bills mentioned, so as to be paid out of the real assets in default of the personal. The Decrees are therefore reversed, with costs, and the causes are remanded, to be proceeded in, pursuant to the principles of this Decree.

Decided, Feb.  
18th, 1817.

### Southgate against Taylor.

1. If the assignee of a mortgage, having obtained a decree of foreclosure and sale, become himself the highest bidder; but, in consideration of a sum of money in hand, and a promise of the assignor to pay, in a short time, the balance of the debt, for which the assignment was made, he agree to hold the property as security for said debt, but in trust for the assignor; a Court of Equity will compel him to give up and re-convey the property, upon the assignor's paying him the balance due on the bond, with the costs of the foreclosure and sale; deducting therefrom not only the *actual profits*, he received, while he held the property, but such profits as, but for his wilful default, he *might* have received, and also the amount of any *waste or dissipation*, committed by him, or suffered by his neglect.

IN this case, the Appellant being indebted by bond to *Gilliat and Taylor*, of the Borough of *Norfolk*, and having a mortgage upon the *reversion* of a tract of land, which was then in the seisin of a Mr. *Samuel Cary* and *Elizabeth Cary* his wife, who held the life estate, made an assignment of that mortgage, to be placed, if received, to the credit of said bond. *Gilliat and Taylor*, as assignees, brought a suit in Chancery against *Charles Grymes*, the mortgagor, and obtained a Decree for the sale of the mortgaged premises, by Commissioners, appointed for that purpose. In May, 1805, (the life estate not having fallen in,) the reversion was advertised for sale in obedience to the Decree. *Southgate*, being alarmed, lest a forced sale of the reversion, for cash, might not produce the amount of the mortgage debt, interest and costs, (which would so far operate to his injury,) attended the sale with what money he could raise, in order either to prevent it, or to purchase the property, if sold. The sale being had, he became the highest bidder at 720*l.*; at which price the property was struck off to him; but the agent

of *Gilliat* and *Taylor*, who was present, finding that he could not pay more than \$450 of the purchase money, demanded that the land should be again set up; whereupon, it was purchased, by the said agent, for *Richard Taylor*, (who, it seems, was then the sole proprietor of the claim of *Gilliat* and *Taylor* upon the Bond and Mortgage,) for the same sum of 720*l*; and a Deed was executed by the Commissioners, to *Richard Taylor*: but *Southgate* alleged, that 720*l*. not being equal to one half of the value of the property, *Burcher*, the agent, agreed, with him, that he would take with him what money *Southgate* had; and if Mr. *Taylor* would agree to it, he would pay him the money; upon which the said *Taylor* would hold the land as security for the debt, but in trust for *Southgate*, who would, in some short time, to be agreed upon, pay him, the said *Taylor*, the full amount of his bond, not taking into the account the sale of the land; but that, if the said *Taylor* should insist upon claiming the purchase for himself, he, the said *Burcher*, would return the money to *Southgate*. *Taylor* denied that such agreement was made, or that he was bound by it; yet it was certain that he received of *Burcher* the \$450, which *Southgate* sent, and afterwards was very pressing for additional payments upon the Bond, which he received, at sundry times, during the life of Mr. and Mrs. *Carey*, the tenants for life of the land, to the amount of \$1922,66 cents; but, after the deaths of both those tenants, he insisted that the land was his own by virtue of the purchase aforesaid, and leased it one year as such, for the sum of \$187, 79 cents, rent. For several years he neglected to lease it to any body, and suffered it to be greatly injured by waste and dilapidations, to the amount, as *Southgate* alleged, of \$1000. *Taylor*, claiming the land as bought by him for 720*l*. admitted that *Southgate* was entitled to a credit for that sum, and therefore that his Bond was considerably overpaid; but declared himself willing to pay the surplus. But *Southgate*, not acquiescing in this arrangement, filed his Bill against him in the Superior Court of Chancery for the Williamsburgh District, praying a Decree, that the defendant deliver up the Deed, made by the Commissioners upon the sale of the mortgaged premises, to be cancelled and set aside; that he surrender the possession of the land, with the mesne profits, to the Complainant, upon the Complainant's paying the full amount of what might be due

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upon the Bond; and that such farther and other relief be granted as should be agreeable to equity.

Chancellor NELSON, upon the Bill, Answer, Exhibits and Examinations of Witnesses, decreed, that the defendant do deliver to the plaintiff possession of the land mentioned in the Bill, and all the title papers concerning the same, and convey and transfer all his right and title, &c., upon the plaintiffs paying to the defendant the balance that might be due on his Bond, of 843*l.* 10*s.* 4*d.*, with legal interest on the same 'till paid; and all legal charges and costs, attending the prosecution of the suit brought in the County Court of Gloucester, by the defendant, against *Charles Grymes*, to foreclose the mortgage on the land aforesaid, and costs attending the sale thereof, after deducting therefrom the *actual profits* of the said land, which had accrued since the death of *Elizabeth Cary*, the surviving tenant for life; and directed, that a Commissioner examine, state and settle an account between the parties, in order to ascertain the balance, that might be due the defendant, and make report, &c.

A Report being made by a Commissioner, shewing, upon the mode of stating the account prescribed by the Decree, a balance due *Richard Taylor*, of \$1907 27 cents, with interest on \$1597, 48 cents, part thereof from January 1st, 1810, 'till paid; the Chancellor decreed farther, on the 23d of October, 1815, that, unless the plaintiff should, on or before the 23d of April ensuing, redeem the said land, by paying to the defendant the said balance and interest, certain persons appointed Commissioners, or any two of them, after giving three weeks previous notice in one of the Norfolk Newspapers, should expose to public sale, at auction, for ready money, the tract of land in the Bill mentioned, and out of the proceeds of sale, pay unto the defendant the said principal money, interests, and costs by him about his suit in this behalf expended, and the surplus of the proceeds of sale, if any, after deducting the expenses attendant thereon, pay unto the plaintiff, and make report thereof to the Court in order to a final Decree.

From this Decree, the plaintiff was allowed an Appeal, upon a Petition to this Court.

The Record was submitted without argument.

February, 18th, 1817, Judge ROANE pronounced the Court's opinion. FEBRUARY, 1817.

The Court is of opinion that the Decree is erroneous in limiting the Commissioner to the actual profits, received from the land in controversy, and in not allowing to the Appellant credit for the amount of waste and dilapidations committed on the same, after the death of Mrs. *Elizabeth Cary*, through the permission or negligence of the Appellee; it being the opinion of the Court, that, instead of the actual profits as aforesaid, the Appellee should be charged with such as he *might* have received but for his wilful default, to be settled by a Commissioner; and also that the amount of the waste and dilapidations aforesaid, if any, should be ascertained by an Issue.

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The Decree is therefore reversed, with costs, so far as it conflicts with the above principles; and the residue thereof is affirmed; and the cause is remanded in order to be finally proceeded in.

## Wood's Executor and Miller *against* Hudson and others. Decided, Feb. 18th, 1817.

UPON an Appeal from a Decree of the Superior Court of Chancery for the Staunton District, in three suits connected with each other, the *material* circumstances of which may be stated as follows. 1. A sale of mortgaged land by Commissioners in Chancery ought to be set aside, and another decreed, upon its appearing to the Court that the highest bidder at such sale had previously agreed with a purchaser from

In April, 1803, *Aaron Fuqua* filed a Bill against *Obadiah Fuqua*, to foreclose a Mortgage on a tract of land in Kanawha County, bearing date the 11th of August, 1801; and, at November Term, 1804, obtained a Decree, that, unless the debtor, the mortgagor, that he would allow such purchaser to redeem the land within a limited time, by repaying him his money with interest; and that, such agreement being known at the sale, other persons were induced to refrain from bidding, and, consequently the land was struck off to him at a price inferior to its value.

2. The Act of Assembly, "concerning the sale of property under Executions, and Incumbrances," passed February 1st, 1808, (2 R. C. p. 156,) applied to a sale of mortgaged land by Commissioners in Chancery, *after the 1st day of March, 1808*; notwithstanding the decree was pronounced, and the time limited for paying the money to redeem the land had elapsed, before the passage of that Act.

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defendant, on or before the 1st day of January ensuing, should pay to the plaintiff the sum of 62*l.* 10*s.* 4*d.* with interest, &c., the defendant should be barred and foreclosed, &c., and that the land should thereupon be sold by certain persons appointed Commissioners for that purpose. The Commissioners sold the land on the first Saturday in May, 1805, at public auction, to *Davis Hudson*, for the sum of \$310, which he paid to them, and they, after paying the debt, interest and costs to the plaintiff, and retaining six dollars for their trouble and expenses, in carrying the decretal order into effect, paid to the defendant's administrator, (the defendant having died intestate since the decree,) the balance remaining in their hands. *Aaron Fuqua* the mortgagee, made the conveyance to *Hudson* the purchaser.

At March Term, 1808, *Henry Wood* filed a Bill against *Davis Hudson*, and *Morris Hudson*, his father, (who furnished the money, with which he made the purchase,) to set aside the sale; claiming the land, partly as a purchaser from *Obadiah Fuqua*, the mortgagor, who made him a Deed on the 15th of January, 1805, when he the said *Wood*, (though he knew of the mortgage, and of the pendency of the suit to foreclose,) was not informed of the Decree; and partly, on the ground that *Davis Hudson* had bought the land, at the sale by the Commissioners, for the benefit of him the said *Wood*, the money being lent by *Morris Hudson* for that purpose; that *Morris* and *Davis Hudson* both agreed, before the sale, that, if *Davis* should be the highest bidder, the complainant *Wood* should be allowed to redeem the land, by paying him with lawful interest, whatever sum he might give for the land, within two months thereafter; that this arrangement was understood by the Commissioners, and other persons present at the sale, and prevented others from bidding; in consequence whereof the said *Davis Hudson* became the purchaser, at the low price of \$310, very far inferior to the value of the land: and (the Complainant having failed to pay the money within the two months, and having also failed to make the payment in October following, to which farther time indulgence was given,) the said *Davis Hudson*, afterwards refused to receive it, (when offered with interest,) and claimed the land as his own.

The answers of *Davis* and *Morris Hudson* denied, that any loan of money was intended to be made by either of them, to

*Wood* or for his benefit; averring that the purchase was made by *Davis* for his own benefit altogether. They admitted, however, the agreement alleged in the Bill, that *Wood* was to be permitted to redeem the land in the manner therein mentioned; but contended that, since he had not redeemed it, within the time limited, he had no right to do so after the time had expired. It appeared, also, from the answer of *Davis Hudson*, and sundry depositions of witnesses, that the agreement, between him and *Wood*, was generally known at the sale; that *Wood*, relying upon it, and wishing the sum, he should have to pay to redeem the land, to be as small as possible, endeavoured to prevent the bidding of other persons, and consequently that the land, (which was worth five or six hundred pounds,) was cried out to *Hudson* at the sum before mentioned.

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In April, 1806, *Davis Hudson* filed a cross-bill against *Henry Wood*, in which he contested the right of the said *Wood* to the land, under his purchase from *Obadiak Fuqua*, on the ground, that that purchase was made after the time had expired, which the Decree of November, 1804, had limited for the redemption of the mortgage; and, indeed, was nothing more than a speculation, upon a tract of land already decreed to be sold at public auction, which could give no legal title to the purchaser, nor introduce him favourably to a Court of Equity. He also, (insisting upon his right to the land as highest bidder at the sale, and again denying the truth of *Wood's* allegation that he was bidder for his benefit,) set up a claim as purchaser of the dower right of *Polly Fuqua*, widow of *Obadiak Fuqua*, in the same land, which dower right he had bought of her for \$200; and, afterwards, (making her a party by an amended bill,) he clearly established his title, so far, by a Deed from her, and by her answer. He prayed that *Wood* might be compelled to account for rents and profits of the land, to make compensation for injuries to the timber and improvements, to deliver possession of the whole; or, at least, that the widow's dower might be assigned to him, and a recompense decreed for its detention.

*Wood*, by his answer, insisted on the same grounds of title before set forth in his bill, and also alleged that *Mrs. Fuqua* had promised to convey her right of dower to him, upon his

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proving that he had paid the original purchase money to *Obadiah Fugua*, which he averred he had done.

On the 10th of April, 1807, the Chancellor, on the motion of *Wood*, granted an injunction to restrain *Davis Hudson* from recovering the land by Writ of forcible Entry and Detainer, until the farther order of the Court; and also prohibited *Wood* from committing waste, &c.

At November Term following, an order was made, appointing Commissioners to lay off the widow's dower, and to report the profits thereof received by *Henry Wood*; which order was obeyed; and by their Report it appeared, that he was chargeable with one year's rent of the dower land, rated at twenty dollars.

At the same Term, the cause of *Wood* against *Hudsons* coming on to be heard, the Court decreed *that the sale and report of the Commissioners*, mentioned in the Bill and answer *be set aside*, and directed another sale to be made by the same Commissioners. In obedience to this Decree, the land was sold on the 14th of March, 1808, and again bought by *Davis Hudson*, for the sum of \$536, he being the highest bidder; which sum the Commissioners retained in their hands, subject to the future order of the Court.

On the 15th of April, 1808, the Chancellor, "being of opinion, *that this case was not embraced by the Act of Assembly, of the last session, entitled an Act concerning the sale of property under Executions and Incumbrances,*" affirmed the report, and decreed "*that the plaintiff do forthwith deliver possession of the land to the defendant Davis Hudson.*" &c.

On the 9th of January, 1809, a certain *Thomas Miller*, who claimed the same land, as a mortgagee from *Henry Wood*, having advanced a thousand dollars, to enable the said *Wood* to pay the original purchase money to *Obadiah Fugua*, and taken a mortgage to secure that sum, filed a Bill against *Henry Wood*, *Davis Hudson*, the Administrators of *Obadiah Fugua*, and the Commissioners, contesting the propriety of the sale, so confirmed by the Court, on various grounds, which need not here be mentioned.

At June Term, 1814, *Wood* having departed this life, the several suits were revived against his heirs and representatives. And on the 8th of July, 1815, the Chancellor, (*Brown*) pronounced the following opinion and Decree.

" It appears to the Court, that in the cause first above mentioned of *Wood v. Hudsons*, a decree was pronounced on the 24th day of November, 1807, directing a re-sale of the land in controversy, by Commissioners therein named; in pursuance of which decree, four of the said Commissioners sold the said land to the defendant *Davis Hudson*, for the sum of \$536, as appears by the report of their proceedings, returned to this Court on the 1st day of April, 1808. On the return of that report, this Court on the 15th day of April, 1808, pronounced a decree affirming the sale made by the Commissioners; directing possession of the land to be delivered to said *Davis Hudson*, and quieting his title thereto; directing the Commissioners, after retaining their Commissions, and the costs of sale, to pay, out of the purchase money, to the said *Davis Hudson*, the sum of \$310, with interest from the 1st of May, 1805, and to pay the balance of the purchase money into Court, subject to its future order. By that decree, also, the Court dismissed the Bill of the plaintiff *Wood*, as to the defendant *Morris Hudson*, and awarded the said *Morris Hudson* his costs. In pursuance of that decree, it appears that the said *Davis Hudson* has been put into possession of the land aforesaid, and, as appears by the report of said Commissioners, dated 25th June, 1808, has been paid the said sum of \$310, with interest from the said 1st day of May, 1805, to the said 25th day of June, 1808, amounting in the whole, to the sum of \$368,62 1-2 cents. That sum, together with \$16,89 cents, the costs of sale, and the commission allowed the said Commissioners, deducted from the purchase money, leaves still in their hands the sum of \$150,54 1-2 cents, subject to the future order of this Court. Nothing therefore remains to be done in this cause, but to decide the question of costs between the plaintiff and the defendant *Davis Hudson*, and to dispose of the balance of the purchase money aforesaid. On the subject of costs, the Court thinks that, though the plaintiff hath obtained relief, yet that it is under circumstances, which do not entitle him to recover costs; but that, on the contrary, he ought to pay the costs of the defendant *Davis Hudson*. These costs, together with the costs decreed to *Morris Hudson*, may be paid out of the purchase money in the hands of the Commissioners. The balance of the purchase money, being a subject of controversy in the other two cases, will be disposed of in them. In the case of

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*Davis Hudson* against *Henry Wood* and *Polly Fugus*, the Court is satisfied that the plaintiff is entitled to recover the dower of the defendant *Polly*, in the land aforesaid, and the rents and profits thereof, during the time, that the possession was withheld from the said *Hudson* by the defendant *Wood*. The amount of the rents and profits, so to be recovered, is twenty dollars, as appears by a report of the aforesaid Commissioners, not dated, but made in pursuance of an order of this Court, of the 24th day of November, 1807. The particular land, assigned as the widow's dower, by the plat of survey, made by *Reuben Slaughter*, dated on the 14th of March, 1808, and returned with the last mentioned report, need not be set apart for that purpose, as the plaintiff *Hudson* is owner of the whole tract. The plaintiff *Hudson* is entitled to his costs in this suit, to be paid by the defendant *Wood*, which, together with the twenty dollars for rents and profits aforesaid, must be paid out of the balance of the purchase money in the hands of the Commissioners. In the case of *Miller* against *Wood, Hudson* and the Commissioners, the Court will not now deliver any opinion between the plaintiff and the defendants, the representatives of *Wood*: but the Court is satisfied that the plaintiff has shewn no title to disturb the sale aforesaid, to the defendant *Hudson*, and no title to any relief against him or against the Commissioners. The bill will be dismissed against *Hudson* and the Commissioners; and the plaintiff must pay them their costs, to be retained out of the purchase money aforesaid, if sufficient there be for that purpose; and the balance of the purchase money, if any, must be paid into Court, to be disposed of between the plaintiff *Miller*, and the defendant, *Wood's* representative, as may hereafter seem proper."

"It is therefore adjudged, ordered and decreed, that, in the cause first above mentioned, the plaintiff *Wood's* Executor do pay unto the defendant *Davis Hudson*, his costs by him in this behalf expended; which costs, together with the costs heretofore decreed in this case to the defendant *Morris Hudson*, the Commissioners aforesaid are hereby authorized and required to pay, out of the balance of the purchase money, still remaining in their hands. It is farther adjudged, ordered and decreed, that in the said second cause above mentioned, the plaintiff *Davis Hudson* be quieted in the enjoyment of the dower right

of the defendant *Polly* in the lands in the bill mentioned ; and that he recover against the defendant, the Executor of said *Henry Wood*, the sum of twenty dollars for rents and profits aforesaid, and his costs expended in prosecuting this suit, to be paid also by the said Commissioners, out of the money in their hands as aforesaid. And it is farther adjudged, ordered and decreed, that, in the case of *Miller* against *Wood's* Executor and others above mentioned, the bill of the plaintiff be dismissed, as to the defendants *Davis Hudson* and the Commissioners ; and that the said plaintiff do pay unto the said defendants their costs, expended in defending this suit ; to be paid out of the balance of the purchase money aforesaid, if sufficient there be for that purpose : and, if there be any surplus in their hands, after satisfying the several sums of money herein decreed, the said Commissioners are hereby required to pay the same into this Court. This last mentioned cause is continued, as to the other defendants, to be hereafter acted on."

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From this Decree, *Wood's* Executor and *Miller* appealed.

*February 18th*, 1817, Judge ROANE pronounced the Court's opinion.

The Court perceives no ground for disturbing so much of the Decree, as sets aside the first sale of the land in controversy, made by the Commissioners in the proceedings mentioned ; but is of opinion that the *second sale* made by the Commissioners *was improperly made, and ought to have been set aside* ; no regard having been had to the provisions of the Act of Assembly, passed February 1st, 1808, entitled, "an Act concerning the sale of property under Executions and Incumbrances." The several Decrees, therefore, so far as they proceed on the principle of affirming that sale, are reversed with costs, and the causes are remanded to the Court of Chancery, to be finally proceeded in.



Decided February 19, 1817.

### Foster against Clarke.

1. It is not equitable for a defendant to a Bill of Injunction, (in whose favour a Judgment at law was rendered, for a sum of money, which he had paid as security for the Complainant,) to except to the Commissioner's statement of the debits and credits between them, "to the time of the Judgment; on the ground that, before a Commissioner in Chancery; that the circumstances of the case, and conduct of the parties, they considered their accounts as closed, and nothing due on either side;" and, yet, to select and rely upon the Judgment, as an item in his favour, in exclusion of the other items in the account.

THE Appellee having obtained a Judgment, on motion in a summary way, against the Appellant, in the County Court of Hanover for the sum of 42l. 12s. 6d., paid by the former, in the year 1799, as Security for the latter; the Appellant obtained an Injunction from the Superior Court of Chancery, for the Richmond District; alleging, in his Bill, that the Appellant was largely indebted to him on various accounts, particularly as partner in a Mercantile Company; that a balance was also due the Complainant on his Administration Account of the estate of *David Clarke*, father of the defendant, who alone stood responsible for that balance; that some of the Credits, to which the Complainant was entitled, were not proper distinct counts at law, and some could not be well established except before a Commissioner in Chancery; that *William Clarke*, the plaintiff at law and defendant in equity, was insolvent; and, if he recovered the amount of the Judgment, the Complainant could not get it back.

The defendant, in his answer, gave an history of various transactions in relation to the accounts in question, and concluded with declaring, that he believed himself to be a Creditor of the Complainant, not only on their partnership, but on all other accounts, independent of the Judgment sought to be enjoined.

A Commissioner, by order of the Chancellor, examined, stated and reported the Accounts between the parties, including the Judgment; and, according to such statement, shewed a balance of \$692,16 cents principal, and \$346,20 cents interest, due to *Peter Foster* the Complainant: but the Commissioner expressed his opinion, that, "considering the relation between them, and the manner, in which they had transacted their business with each other, it never was their original intention to bring forward any of these claims against each other."

The defendant, by his Counsel, excepted to the whole statement of debits and credits, "to the time of the Judgment; because, from the circumstances of the case, and conduct of the parties, as would appear from the evidence in the cause, they

"considered their accounts as closed, and that nothing was due  
"on either side."

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Chancellor TAYLOR dissolved the Injunction, and dismissed the Bill, with Costs; from which Decree the Appeal was taken.

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February 19th, 1817. Judge ROANE pronounced the Court's opinion.

The Court is of opinion that, as the sum in question was paid by the Appellee in the year 1799, and as the Appellee himself admits or contends, in his exceptions, that the other transactions between the parties, as of that date, should be considered as settled, in consequence of the lapse of time and the relations, which then existed between them, it is not equitable in him to select and rely upon this item in exclusion of others. On this ground, the Court reverses the Decree with Costs, and perpetuates the Injunction.

### Hughes against Hall.

Decided February 20, 1817.

TO a Bill exhibited by the Appellant in the Superior Court of Chancery for the Richmond District against the Appellee, he pleaded, on Oath, "that the Land in the said Bill mentioned, relative to which the Complainant prays for a specific execution of the Contract in the Bill mentioned, lies in the County of New Kent; and the said alleged Contract, relative to said Land, was made and entered into in the said County of New Kent; and this defendant also alleges that he himself at the time of the institution of the said suit, in which the said Bill is filed, and for a long time before, and at this time, was and is an inhabitant of and resides in the said County of New Kent; and that the said suit, so instituted against this defendant as aforesaid, ought to have been, if brought in a Superior Court of Chancery, brought in the Superior Court of Chancery holden at Williamsburg, and not in this Honourable Court;" &c.

1. The several Superior Courts of Chancery have jurisdiction in cases where their process is served, upon the defendant, within their respective Districts; though his place of residence, and also the land in controversy be in a different District.

Chancellor TAYLOR, being of opinion, "that, since, by the 12th section of the Act, entitled, "an Act concerning

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"the High Court of Chancery," it is clear that, wherever "there may be more than one defendant in a suit, the same may be instituted in that district, where either of the defendants may *reside*, it would seem to follow, as clearly, that, "if there be but one defendant, a suit against him should be "in the district of his *residence*, or the obvious intention of "the Legislature might be frustrated," therefore dismissed the Bill with Costs; declaring, also, "that this opinion did not "in any manner conflict with the principle of any case heretofore decided in his Court."

Whereupon the plaintiff appealed.

*William Hay, jr.* for the Appellant. The case may be stripped of every thing relating to the locality of the subject in controversy. To give the Court jurisdiction, it is not necessary that the Land should lie within the local limits of the jurisdiction of the Court.

Equity acts upon the *person*, and not upon the *thing*; and, where the person is amenable to its process, may take juris-

(a) *Ld. Cranston v. Johnston*, 5 Vasey jr. 182; *Farley v. Shippen*, *Wythe's Rep'ts.* 135; *Guerrant v. Fowler & Harris*, 1 H. & M. 5.

isdiction concerning Lands, even in foreign states. (a) The single question then is, whether, upon *general principles*, or the construction of the *Acts of Assembly*, the defendant should have his *domicil* within the district. This is not necessary upon *general principles*. Equity, acting upon the *person*, may act whenever the person is within the reach of its process.

There is no *venue* in a Bill in Equity. The Equity, whatever it may be, attaches upon the person, and is as transitory

(b) *Foster v. Vassall*, 3 Ark. 587.

as the cause of action for an assault and battery. (b) I will proceed, then, to review the Acts of Assembly.

By the law constituting the late High Court of Chancery,

(c) 1 R. C. ch. 64. § 8.

(c) it was not necessary, to give the Court jurisdiction, that the defendant should have his domicil within the State. That Court had "general jurisdiction over all persons and all causes in Chancery," &c. to be exercised, of course, upon the general principles of equitable jurisdiction, so far as not restrained by the Act itself: there is nothing in the Act requiring residence in the defendants. *Quoad* the case in question, then, that Court had jurisdiction. Now, by the provisions of the Acts, arranging the present Districts, the Judges of the Courts, thereby constituted, have "the same jurisdiction within their Districts," which the Judge of the High Court of Chancery

had anterior to the passage of those acts. Jurisdiction, then, is expressly conferred in the case in question; because the Judge of the High Court of Chancery would have had it unless the words "*within their Districts*," *ex vi terminorum*, require residence, or there be other words, in the Act, requiring it. They do not. Their effect is to restrain the execution of process, without the local limits of the jurisdiction, unless in a case, where there are defendants residing in different Districts; but not to take away jurisdiction, where the defendant is found within the limits.

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There is an analogous clause in the County Court Law. (a) <sup>(a) 1 R. C. ch. 67 § 5.</sup> General jurisdiction is conferred upon the County and Corporation Courts, in Chancery and Common Law, "*within their respective Counties and Corporations*." It has never been questioned that a County Court, in transitory actions at common law, and in suits in equity, had jurisdiction, if the defendant could be served with process in the County, although he might reside in a different County. The provision concerning Bail, in the 23d section of the Act, directing, "that no Bail shall be demanded on a Writ of *Capias ad respondendum*, which shall be issued against a resident of one County in any other, until a *non est inventus* has been returned in the County or Corporation, in which the defendant resides," is a recognition of the right to sue the defendant in any County, in which he may be found. It does not, indeed, confer this right, but is a recognition of jurisdiction already conferred. By what words of the Act? There are none which can have this effect, but those just recited, conferring jurisdiction upon the Courts "*within their respective Counties and Corporations*." These words, then, and the words, "*within their Districts*," in the Chancery law, do not restrain the jurisdiction to cases of residence, within the limits, upon the part of the defendants.

The only other clause in the Act, necessary to be noticed, is that, providing that, where there are several defendants residing in different Districts, suit may be instituted in either District, and process may be sent to the other District. Some rule was necessary to be established in a case of this kind, which might frequently occur, and in which there would be difficulty in proceeding; for the other defendants might not

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come within the District, so as to be served with process: what was then to be done? The Act provides for the case, and authorizes process to be sent without the District. This, and this alone, is the object of the clause.

*Nicholas for the Appellee.* This is a question of Jurisdiction. The Land in controversy lies out of the jurisdiction of the Chancery Court at Richmond; and the defendant is a resident out of the District.

It is a general principle that the Jurisdiction of a Court of Equity can only operate *in personam*, or *in rem*. The first is where the defendant is within the jurisdiction; the second where the Land or other property is; as in the case of Attachments against absent defendants. Under the original jurisdiction of the High Court of Chancery, its jurisdiction being co-extensive with the State, no question could arise, as to the residence of the defendant. Wherever the process could be served, the Court had jurisdiction. But the case is different now. The Preamble to the Act of January 23d 1802, (1 R. C. p. 426.) speaks of the delays, inseparable from that Court, as producing the division. The object, then, was to distribute the jurisdiction, so as to divide the persons, on whom it was to operate. Otherwise, if a man travelling through a District could be sued, one of the Courts might absorb all the jurisdiction, and thus renew the evil, intended to be abolished.

The 11th section of that Act, and also the 1st section of the supplemental Act, of February 2d 1802, (1 R. C. p. 429.) which prescribes the rule for distributing the suits then pending in the High Court of Chancery, shews plainly that, in determining the jurisdiction, the Legislature chiefly regarded the place of the defendant's residence. If this be not attended to, the great object of the Legislature must be defeated. Similar provisions, too, are introduced into the subsequent laws farther dividing the Chancery Districts. (a) All those laws, which are to be considered *in pari materia*, shew clearly the intention of the General Assembly, that a defendant should not be sued out of his Chancery District; and, being remedial laws, such construction should be given them, as will promote the ease of suitors and public convenience; not such, as would defeat the great object, they had in view.

(a) *Sup. to R. C. ch. 95. sect. 14; Acts of 1813-14. p. 44. sect. 3 and 7.*

*Hay in reply.* The instance mentioned by Mr. *Nicholas*, in which a Court of Equity acts *in rem*, to wit, the proceeding in foreign Attachment, rather confirms than weakens my position. The proceedings in that case are authorized by *Statute*; anterior to which there is no instance of a Court of Equity exercising the jurisdiction conferred by it.

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It is not pretended that there is any *express* provision in the Act requiring residence, but only a strong *implication*, that such was the intention of the Legislature, from the various clauses relating to the arrangement of the papers, and from the obvious policy of the law. *Some* rule was necessary to be established for that purpose, to control the arbitrary discretion of the Clerk; and none was more convenient, than the one adopted.

Besides, the implication, however strong, cannot have the effect contended for. It is a sound rule of construction, that the jurisdiction of a Court cannot be ousted by implication, but must be *expressly taken away*.

As to the policy of the law, Mr. *Nicholas* seems to think that it was intended for *defendants* alone. This surely was not the case. If it be an evil for a *defendant* to travel a great distance to the Court, it is as great an evil for a *plaintiff*. The argument founded on the policy of the law then proves nothing.

February 20th, 1817. Judge ROANE pronounced the Court's opinion, that the Decree be reversed, the plea to the Jurisdiction over-ruled, and the cause remanded for farther proceedings.

### Travis against Claiborne.

Decided Feb.  
27, 1817.

PHILIP CLAIBORNE, as Trustee for the benefit of *David* and *James Halliday and Company*, brought an action of Trover against *Joseph H. Travis*, in the Superior Court of Brunswick County, for the value of a negro man slave named *Aaron*.

1. If a Slave, conveyed by Deed of Trust to secure the payment of a Debt, be permitted to remain in the Debtor's

possession, who thereupon, by an *Agent*, sends him out of the State, and sells him; such *Agent*, not having actual notice, of the *lien* on the slave, before he pays over the money to his principal, is not responsible to the Trustee, or the Creditor; notwithstanding the Deed was duly recorded.

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The parties agreed a case, from which it appeared, that a certain *John Drummond, jun.* being in lawful possession of the slave in the declaration mentioned, conveyed him to the plaintiff by a Deed of Trust, to secure the payment of a debt to the said *D. & J. Holliday and Company*, which Deed was duly recorded in the County Court of Brunswick; that, afterwards, the defendant carried the said slave, as agent for the said *Drummond*, to some part of the western country, and sold him under a contract to that effect, for a commission of twelve and a half per cent. on the amount of the sale, and paid over the amount to *Drummond*; that the plaintiff, the defendant, and the said *Drummond*, all resided in the County of Brunswick, and *D. & J. Holliday and Co.* were merchants of the town of Petersburg; that the debt to them remained unsatisfied; that the slave had remained in *Drummond's* possession in the said County, from the date of the Deed, 'till the defendant carried him away; that the defendant, previous to his payment to *Drummond*, had no notice from the plaintiff, (other than may be inferred from the facts agreed,) of the *lien* upon the slave in controversy; and that no actual demand of the slave was made previous to the institution of the suit.

Upon this case, the Superior Court of Law gave judgment for the plaintiff; whereupon the defendant appealed to this Court.

Friday, February 27th, 1817, the Judges delivered their opinions.

Judge COALTER. If this case turned altogether on the general principle of the liability of an agent or servant, who, by authority of his principal, had converted goods of another, which, by finding or otherwise, had come to the possession of that principal, and to which he never had a title, the question, how far this Court would consider the broad doctrine of the irresponsibility of agents, laid down in the case of *Mires v. Selabay*, in 2 *Med.* 242, as being over-ruled by the cases of *Perkins v. Smith*, 1 *Wils.* 328, and *Parker v. Godin*, *Stru.* 813, would, with me, be a question of no little magnitude. I am willing to say, however, that the case in *Modern*, at present, appears to me to maintain the most reasonable doctrine, although it

seems to be considered by *Buller, Saunders and Chitty*, to have been over-ruled by the other cases above referred to.

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Those cases, however, appear to me by no means as strong, in favour of the agent, as the present. In the case in *Wilson*, the agent, in the first place, undertook to invest his master with the right of property, and then to dispose of it for his use; and thus, as it were, took on him the risk of interfering with the rights of others.

In the case in *Strange*, the agent undertook to pawn, in his own name, the goods of a trader, who had absented himself, and was a bankrupt, and to pay over the money to his wife; and, although the Judges do not put these cases on the ground of actual notice of the bankruptcy, which must have been found by the Jury, if thought important, and not inferred by the Court, yet these were the circumstances; and it might well have occurred to those agents, that they were possibly doing a wrong to third persons.

But, in this case, the plaintiff, although he had acquired a title to the property from the former owner, defeasible by his paying the debt within the time, which, whether recorded or not, was good as to that party, and any agent acting for him, with notice; yet this title is unaccompanied with any change of possession, or other notice, except by recording the Deed, to shew that the right of property had been transferred. If recording the Deed does not affect the agent with notice, but only makes it good against creditors and purchasers, when it would otherwise be void as to them; and if the rule *caveat emptor* does not apply to him, as at present I incline to think, then he would stand, in this respect, as at common law; that is, the plaintiff shews a title under his Deed, but he has permitted the grantor to remain in possession.

It may be said though, that this possession is consistent with the Deed, which is a mortgage or Deed of Trust, and therefore not, *per se*, fraudulent. But, in *Ryall v. Rolle*, 1 *Wils.* 260, it is said that a mortgage of personal property is void as to creditors, if the mortgagor remain in possession; and perhaps the case of *Edwards v. Harben*, 2 *Term Rep.* 587, is a confirmation of this doctrine, rather than the reverse; especially if the continued possession by the mortgagor is not stipulated for in the Deed. Be this, however, as it may, and admitting that



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the continued possession of the grantor is under circumstances which do not make the transaction fraudulent *per se*, it may nevertheless operate that effect upon innocent agents, and ought, therefore, not only to divest the case, as to them, of those circumstances of *apparent wrong*, which may have had weight in the cases in *Wilson* and *Strange* above noted, but to be thrown into the opposite scale, so as to operate in their favour.

For these reasons, I feel little hesitation in concurring with my brother Judges, in reversing the Judgment in this case.

Judge CABELL. The sale of the slave in this case, was unquestionably a conversion; and the sale having been made by Travis as the agent, and for the benefit of *Drummond*, it is equally clear that *Drummond*, the principal, is liable therefor. The only question is, whether *Travis*, the agent, who has paid over the money to his principal, is also liable. I am clearly of opinion that he is not.

The command of the principal will not justify the agent in committing a trespass, nor even an apparent wrong; in such a case, both the principal and agent are liable to the party injured. But where the conduct of the agent is within the limits of the authority confided to him; is fair, and unattended by circumstances, sufficient to apprise him that he is acting wrongfully in relation to others; or, in other words, where he does not commit an *apparent* wrong, the principal and not the agent is responsible for the act. These are the general principles upon this subject, and they are clearly established by the case of *Mires v. Solebay*, 2 Mod. 242. There is nothing in the case of *Perkins v. Smith* 1 Wils, 328, nor in that of *Parker v. Godin*, 2 Str. 813, in opposition to these principles. The circumstances were such, as ought to have convinced those agents, that they were acting *unlawfully*; and it was expressly on that ground, that they were made liable. There is a total absence of such circumstances in the case now before the Court. The creditors, *Holliday and Co.*, took a lien only, upon the property of their debtor, *Drummond*; permitting him, however, to remain, as before, in possession, and to exercise all the rights of ownership. *Travis* had no reason (from any thing that I have observed in this record) to doubt that *Drummond* was the

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real, as he certainly was the apparent owner of the property. He has done no more than what *Drummond* employed him to do, and what he believed *Drummond* might lawfully employ him to do; he has acted *fairly* and has honestly paid over the money. I therefore think him absolved from all liability. A contrary decision would, in my opinion, subvert the law upon this subject, and produce much inconvenience, by putting an end to almost all agencies. In thus absolving a *fair* and *innocent* agent, creditors will have no just ground of complaint. They still have recourse against their debtors, or may pursue the property in the hands of the purchasers.

I am of opinion to reverse the judgment.

Judge ROANE. The reason, why the acts of the agent are in many respects considered as the acts of the principal, arises from the relation, which exists between them; and, as the liberty of acting by an agent is an indulgence to the principal, it is reasonable that he should be bound by the acts of his agent, done in pursuance of the authority given him. In such case, the act of the agent is the act of the principal; and no action is imposed upon the latter, but by *himself*, through his agent, acting under his authority; and the agent shall be held not responsible. No injury is done to third persons by this construction: they are in the same situation, as if this indulgence had not been allowed the principal, and he had been compellable personally to do the act. If, on the other hand, the agent goes beyond his instructions, and does more than they authorize; or if he does an act, (as a trespass,) which his principal ought not to require, nor he to obey him in; in either case, his character of agent ceases, and he shall be himself responsible for his acts. Were this not the case, it would be in the power of the agent to subject his principal, by his own misconduct, to what actions he pleased.

The case before us is a case of the former character. The agent has done nothing, but what he was authorized and required by his principal to do. He sold a negro for him, long owned and possessed by him, and paid to him the proceeds; and whether the principal had or had not a right to sell the negro in question, notwithstanding the Deed of Trust, depended upon circumstances within his knowledge; upon the state of

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(a) 1 *Exp. N.P.*  
110; *Bull. N.*  
P. 133.

the accounts between the parties, and other circumstances ; it involved the right of property in the negro. But the right of property in the thing sold, cannot be tried in an action against the agent, if the defendant can shew the least colour of right in his principal, as having been in possession thereof, &c. (a) The agent is not a proper party to such a controversy. He has not the muniments of the principal's title, and is not competent to defend it. He may be deserted by his principal at his pleasure ; and a verdict against the agent will not bind the right of the principal. It would be an enormity, that the agent should be condemned and imprisoned on the ground of invading the property of *A.* in a subject, which, in a future action between the *proper* parties, may be found to be the property of *B.* ; the property of the principal, and not of a stranger.

A construction of this sort would derange and put an end to agencies of every kind. No man would become an agent, without becoming at the same time an insurer ; the premium would be correspondently increased, and the indulgence, given by the law, of acting by agents, would be nullified.

As no injury is done to parties by this construction, as the action still remains against the principal, and against the vendee ; and as, in general, the principal is more responsible than the agent ; I am of opinion, that the present action does not lie. There are no cases, in which such an action has been held to lie, except where the agent has exceeded his authority, has committed a tort, or, at least, an *apparent wrong*.

For these reasons, I am of opinion, that the Judgment should be reversed and entered for the defendant.

Judgment unanimously reversed, and entered for the defendant.

Decided March  
1st, 1817.

### Merrymans *against* Merryman and others.

1. To effect the manifest intention of a Testator, the word "children" may be taken as synonymous with *issue*. In this case, therefore, a devise of Slaves to a married woman, "to her and her children forever," was construed as a devise to her and her *issue* ; the

sundry devises and bequests to his sons, respectively; concluding each clause with the words, "to him and his heirs forever." He afterwards gave to his daughter *Mary Merryman* five negroes, and their future increase, "to her and her children forever." Under this clause, her husband, *Francis Merryman*, had possession of the slaves, and sold or otherwise disposed of them, as his absolute property. After her death, her children *Peter Merryman* and others filed their Bill, in the Superior Court of Chancery for the Richmond District, against *Francis Merryman*, and the purchasers under him, for a discovery of the names, ages and sexes of the negroes in question, held by each of them, for an account of their profits, delivery of possession, and general relief.

The Bill was taken *pro confesso* as to *Francis Merryman*, who was out of the Commonwealth, and against whom an order of publication was executed.

The plaintiffs contended, it was obvious from the other parts of the Will, that the Testator knew the distinction between "*children*" and "*heirs*," and meant, in the clause, bequeathing the negroes to *Mary Merryman* and her *children*, that *they* should take an interest in the said slaves distinct from *her's*. The purchasers, by their Answers, among other things, insisted, that the word "*children*," in the passage alluded to, was intended as a word of *limitation*, and not of purchase.

Chancellor TAYLOR dismissed the Bill as to those defendants; from which Decree the plaintiffs appealed.

*March 1st, 1817.* Judge ROANE pronounced the Court's opinion.

"The Court is of opinion, that, although a devise to a married woman, '*and her children, and their heirs*,' will give a joint estate of inheritance to her and such of her children as are living at the time; and although the term '*children*' is not to be taken as synonymous with *issue*, except to effectuate the manifest intention of the Testator; the said term is

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Court being of opinion that the word "*children*" was not intended to denote the Devisee or Devisees, who were to take, nor to reduce the portion of the interest of the mother in and to the Slaves before given to her by the same clause, but to declare the duration of her interest therein.

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so to be taken in this case; it not being intended to denote the devisee or devisees, who were to take, nor to reduce the portion of the interest of the mother in and to the slaves, before given to her by the same clause, but to declare the duration of her interest therein to be to her and her children forever; that is to say, to her and her issue."

"On the ground of this construction, the Court approve the Decree dismissing the Bill, and affirms it."

Decided March  
3d, 1817.

### Birchett and others *against* Bolling.

1. An Agreement to build a Tavern in partnership, at the joint expence and risk, and for the joint benefit, of the contracting parties, to be held by them in fee simple, decreed to be specifically performed, at the instance of a partner, who furnished the ground for the purpose, and had fully performed the Contract on his part; notwithstanding many of the partners were unwilling to carry it into effect, because, in their opinion, a change of circumstances had rendered the scheme unprofitable.

IN October 1807, *Robert Bolling*, thirteen other individuals, and five mercantile companies agreed to build on a Lot of his in Petersburg, (which he sold to the association for the purpose,) an elegant Tavern, to be called the "Columbian Hotel," at their joint expence and risk, and for their joint benefit, the cost of the building and out-houses, by a rough estimate, was to be \$18,000; that of the Lot was \$2000, which *Bolling* subscribed as his proportion of stock in the firm. The whole sum subscribed was divided into forty shares, of five hundred dollars each, to be held in fee simple by the partners; each of whom subscribed for two shares; except *Bolling*, who took four shares, as aforesaid. There was a House on the Lot, which he agreed to remove, in order to make way for the Hotel. A written Agreement, or Subscription Paper, to this effect, was signed by them all. Several meetings of the Subscribers took place; a majority decided, and their proceedings were signed by their President and Secretary. At their first meeting, after the agreement, they chose five of the partners Commissioners to commence the execution of the plan. At a subsequent meeting on the 21st September 1808, the Commissioners were directed to proceed to erect the building.

2. An Attachment ought not to be awarded against a party for refusing obedience to a Decree, which as yet remains general and uncertain, and the extent of which, as it relates to him, he cannot ascertain without applying to the Court for a farther Decree.

Two of those Commissioners, *John Bell* and *Edward Penell*, having refused to act; at another meeting, held on the 16th of

3. A Decree ought not to be reversed for uncertainty, in matters, as to which it is only interlocutory, and may be perfected by application to the Court.

*April 1810, Thomas Bennett* was appointed to act as Commissioner or Trustee, with *John Wilder* and *Robert Bolling*; and they were authorised and directed to erect the Hotel, as soon as possible, according to a plan then approved, and to call on the share-holders for their proportions of the subscription; the expenditures were in the mean time limited to ten thousand dollars, the residue to be expended when necessary and proper. Those Commissioners proceeded accordingly to perform the trust, and made considerable progress in the work. They suspended their operations during the difficulties occurring in the foreign relations of the United States, (in which suspension *Bolling* acquiesced,) but resumed them, after those difficulties ceased.

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*Bolling* complied with the Contract on his part, by removing the House to make way for the Hotel, and conveying the Lot, in fee simple, by a Deed duly recorded, accompanied with a relinquishment of his wife's dower. He afterwards filed his Bill in the Superior Court of Chancery for the Richmond District, setting forth that *John Bell*, *Robert Birchett*, *Richard F. Taylor*, *Edward Powell* and *William Cumming* refused to pay their proportions of the subscription; that *William Johnson*, executor of *William Potts* deceased, also refused to pay the subscription of his Testator out of the assets in his hands; that the other subscribers had always been willing to fulfil the Contract, and had partly paid for their shares: praying, therefore, that all the partners, who were living, and the legal representatives of those, who were dead, be made defendants to the Bill; and that the unwilling defendants be compelled to perform the Agreement on their part specifically.

The joint Answer of *John Bell*, *Robert Birchett*, *Richard F. Taylor*, *Edward Powell*, and *William Cumming* admitted the execution of the Subscription paper, and the proceedings at the different meetings of the partners; but denied that they ought to be bound, either by that agreement, or those proceedings: because, they averred their belief, that all the partners having repented of the bargain, in consequence of its becoming disadvantageous by the Embargo, laid by the General Government, the defendant *Richard F. Taylor* proposed to the plaintiff to rescind the Contract, and accept a reasonable compensation from the subscribers: and that, after having

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considered it, he declared, before the defendants *Birchett* and *Wilder*, that he would take \$4000, as a full compensation for the Lot, and all loss and injury, he might sustain, and release the subscribers from the Contract: that *Birchett* assured him they would pay him that sum: that a paper to that effect was drawn and subscribed by the plaintiff, and by the defendants *Birchett*, *Wilder* and *Borden*, and was to be left at the Bank to be signed by the other partners. The defendant *Birchett* solemnly declared, that, by that writing, the plaintiff agreed to release the subscribers from the Contract, for \$4000; that he, *Birchett*, had not seen it since, and knew not what had become of it: the defendants *Bell*, *Penell* and *Taylor* had never seen it, though anxious to execute it: "*they call on the Appellee to produce it, or to declare its purport if it be destroyed:*" and they believed the other Subscribers would have signed it. The defendant *Bell* acknowledged his activity and zeal at first to promote the scheme, and his efforts, after the Embargo, to persuade the other partners to decline it, and to pay Mr. *Bolling* for the Lot: that he understood from the defendants *Birchett* and *Taylor* that Mr. *Bolling* had accepted their proposal to take a reasonable compensation and release them. He alleged that he attended their meeting, in 1810, only to withdraw his name. The defendant *Birchett* denied that the Deed for the Lot was offered to him for acceptance: the other four respondents admitted it was offered, but that they refused to have any thing to do with it.

The Answer of *John Wilder* admitted the statement in the Bill to be true; that he had paid part, and was ready to pay the balance of his proportion; and that the Hotel was nearly finished. He then gave a different account of what the five unwilling defendants considered a release from the Contract; alleging, that the plaintiff, at his request, agreed that a proposal to pay him \$4000, for their release from the Contract, might be made to the other subscribers; and if they should unanimously agree to it, and he should, after such unanimous agreement, approve of it, he would take that sum: that the plaintiff expressly reserved to himself the right of receding from it, notwithstanding their unanimity: and never signed the writing; and that, as one of the partners refused his assent, the plaintiff, in the presence of this defendant, destroyed it. The

deposition of the same defendant was also taken, and filed, to the same effect with his answer.

Several other defendants filed their Answers, from which it appeared that some of them were willing to carry the agreement into full execution; and others were desirous of being released from it.

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A deposition proved, that the Deed for the Lot was offered to the unwilling defendants to execute, and they refused.

Chancellor TAYLOR, at February Term 1815, decreed in favour of *Bolling*; "that the surviving parties to the agreement should in all things execute and perform it, from time to time, agreeably to its true intent and meaning; that, if the personal representatives of the deceased parties should fail to pay their proportions, when requested, the plaintiff, or any other person interested, might resort to the Court, for an account of the personal assets of the deceased, or for a sale of the shares; and that, if any of the living defendants should become unable to pay their proportion, when requested, the Court might be resorted to, in like manner, to enforce the agreement; and that the defendants *John Bell, Edward Powell, Richard F. Taylor, Robert Birchett* and *William Canning*, by whose conduct this suit was produced, pay to the plaintiff the Costs thereof."

The said defendants refused to pay, in execution of the Decree, their respective proportions of the subscription; though a Copy was shewn them, as was proved by Affidavit. The plaintiff thereupon gave them notice, in writing, that he should, on the 10th of June following, move the Chancellor to attach them for disobedience.

The service of the notice being proved, an Order was made, directing an Attachment to issue against those defendants for refusing to perform the Decree; the Chancellor "being of opinion that there was nothing in the objection, which went to the merits of the Decree, as the Agreement thereby directed to be specifically performed is not a mercantile agreement, and hence should be governed by the general law of the land, and not by those rules, which regulate mercantile Contracts; that the objection, for the want of proof to some of the documents in the cause, not having been made at the hearing, comes too late; and that the objection



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“ to the *general* terms of the Decree is not well founded, since  
“ no process for the execution thereof can issue without the  
“ leave of the Court, or of the Judge in vacation, and there-  
“ fore the Court or the Judge will take care that none shall be  
“ awarded, but to enforce specifically the agreement for the as-  
“ sociation of the parties, in the Bill mentioned ; and hence  
“ nothing can be required of any of them but what is required  
“ by the *Agreement, which is too plain to be mistaken.*”

From this Order, as well as from the Decree, the defend-  
ants *Birchett, Taylor and Powell* appealed.

*Call for the Appellants.* Any of the partners, who chose to  
withdraw from the association now in question, had the right  
to do so, and could not be compelled to remain attached to  
the firm. The rule is that any partner may withdraw, without  
cause, if the duration of the partnership be not limited ; be-  
cause, in that case, “ *tamdiu societas durat, quamdiu consensus*

(a) 1 *Domat*, 154. ; 2 *Pothier* 586. ; because unforeseen events excuse performance ; (b) and  
(b) 1 *Domat*, 154, 156 ; 2 *Pothier* 588. ; because Equity will decree a dissolution for good cause shewn,  
(c) and the party may do what Equity would compel. It is  
(c) *Master v. Kirton*, 3 *Vesey jr.* 74 ; *Watson*, p. 380. true that, if a partner should break off with some sinister view,  
or at an unseasonable time, which might occasion loss to the  
partnership, an action may be brought against him at law, in  
which the remaining partners may be compensated, and dama-  
ges mitigated according to circumstances.

Equity ought not to decree execution of this partnership ;  
because the law can give more just relief, and leave the par-  
ties at liberty to pursue other avocations ; because the utility  
of partnerships depends upon unanimity of counsels ; which  
can never be had if the parties disagree ; because the parties,  
or either of them, may determine it, when they please ; and  
therefore Equity, which never decrees a vain thing, leaves  
them to the law. In this case, too, any partner may demand  
*partition* ; for the articles do not stipulate that the Tavern is  
to be kept. The motives for making the proposed establish-  
ment have ceased, and it would be unconscientious to compel  
performance ; for circumstances have changed, and it is no  
longer an eligible situation. (d) The Decree would be un-

(d) 2 *Scholes & Lefroy*, 340 ; 1  
*Ch. cases* 71.

less; for the insolvency of some of the partners (1) puts it out of the power of the rest to complete the scheme; and neither is obliged to contribute more than his stock: the Court would not decree for the insolvents; (a) and the rule ought to be reciprocal.

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Equity will not permit one party to harrass another. It therefore would have decreed a dissolution upon just terms, (b) which, at most, would have been payment of the difference between the price of the share and the subscription. The conduct of the defendants was perfectly fair; and withdrawing at the time, they wished it, would have been attended with no inconvenience; for the Deed had not passed, and nothing had been done, nor any expence incurred.

(a) 1 Ch. cases  
71; 3 Vesey jr.  
168, Wilking-  
ham v. Joyce.  
(b) 2 Bro. Ch.  
cases, 315; 1  
Perrell on Contr.  
231; 1 H. Bl.  
150. 151; Dick.  
687; 1 Bridg.  
Dig. 9 pl. 20.

The Decree too is erroneous in form; because it is uncertain, and decides nothing; for it does not say whether any party has performed, nor whether the plan of twenty or that of ten thousand dollars shall be pursued, nor what quotas have been called for. It ought to have decreed a sale of the shares, and left the defendants liable for the difference only. An Account should have been taken by a Commissioner, to ascertain the sums due. Besides, the uncertainty of the Decree took from the defendants the benefit of the forthcoming Bond and suspension law; for it was impossible to give the Bond and Security, which the law required.

The Order directing an Attachment was also erroneous; because, the Decree being uncertain, the defendants were not guilty of contempt; and because the plaintiff, in the notice served on the defendants, demanded *interest* on the sums remaining due; and the Decree had not given it.

*John F. May for the Appellee.* I. 1. The authorities cited by Mr Call are applicable to cases of *general* partnerships for an *unlimited* time; and not to special partnerships for a particular purpose. (c) In this case, the partnership will expire with the completion of the Hotel; and the partners will then become joints tenants of the property. This was conceded in another part of Mr. Call's argument. Even in cases of gene-

(c) Watson p.  
380. 2d ed.

(1) Note. It appeared by the Answer of George K. Taylor, Administrator of Edmunds B. Holloway that he had paid only \$450 of his subscription, and it was uncertain whether there would be assets to satisfy the balance.

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(a) *Watson p.*  
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ral partnership, however, no partner can break off with a sinister view, or after the business has been begun.<sup>(a)</sup> In this case, the Appellants have acquired, since the Contract, an interest hostile to the establishment of the Hotel. The business, too, *had been begun*; for the Appellee, for the purpose of commencing the new building, had removed from the Lot a House, which was producing him an annual rent.

2. A Court of Law cannot give adequate relief. If the Bill be now dismissed, the Act of Limitations would bar a recovery in a Court of Law. But a material object of the Contract was to increase the value of property in that part of the town in which the Appellee is a large land holder. Damages alone would not enable him to effect that object; unless he could recover the whole amount subscribed. Besides, there are some of the other parties, who have the same interest, and who might also claim damages. A specific performance will therefore prevent multiplicity of actions.

3. *Bolling* was not to blame for the delay: it was more injurious to him, than to any other person. He was losing the rent of the Lot, the former House having been removed; and he was losing the Interest of his four shares, which were paid for, while all the rest had paid nothing. It was the fault of the other partners, and principally of the Appellants, who postponed, in order to avoid, the execution of their Contract.

4. There is no evidence of the *insolvency* of any of the partners: and, until there be, the Chancellor ought not to have decreed a sale of any of the shares. Any partner may at any time sell his share; and they cannot object that the Chancellor did not decree, that they should do what they have a right to do without a Decree.

5. *Taylor's* proposition, to pay *Bolling* \$4000, and cancel the Contract, could not be acceded to; there is no proof that it was; and *Wilder's* Deposition, taken under an order of Court, is expressly contrary. And, if *Bolling* had been willing, some of the other parties were not.

II. The Decree, for specific performance simply, is right in form. We did not want money merely; but the aid, influence, credit and co-operation of all the partners. The only objection presented to the Court below, by the Appellants, was, that there had been a release by *Bolling*, or that one was

to be inferred from the circumstances. The Court presumed from this, that it was only necessary to decide the cause against the defendants, and that they would with good faith perform the Contract. 2 Eq. Cases Abr. 17. is a precedent of a Decree like this. But if there be error in this respect, it is injurious to the Appellee only. He, and not the Appellants, ought to complain that they were not directed also to pay the amount of their shares respectively. If they wished it corrected, they might have had it done on motion; and therefore it is no reason for appealing. 2 Eq. Ca. Abr. 279. 3 Munf. 29. *Sheppard's Executor v. Starks and wife*. pl. 1.

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III. The Attachment was right: the first Decree was sufficiently certain as to the payment of the \$1000, which, without interest, is all that Mr. *Bolling* demanded. If the Appellants thought it uncertain, they might have had it explained before the Attachment was directed. If they wished to give a Suspension Bond, they should have tendered one, or offered to do so. Instead of which, all their objections to the Attachment were founded in the original Decree. But this is not a case in which a Suspension Bond could have been given. The Act of Assembly (Sess. acts 1814—15.) speaks of *Decrees for Money*. This was not a Decree for money merely, but for specific performance; and to allow a Suspension Bond would be to delay or to avoid the performance. The Legislature, when they mean to provide for cases like this, name expressly *Attachments for failing to perform Decrees*. Rev. co. *passim*.

*David Robertson on the same side.* The reliance of the Appellants on the release is an admission of their prior liability as parties to the agreement; and, by placing their defence on that footing, they waive every objection to the proceedings; precisely, as at law, the plea of payment admits the execution of the Bond, and that it was given for a fair consideration, without fraud or force.

Of this release no proof is produced. And, since it is asserted affirmatively, in opposition to the plaintiff's demand, the burthen of proof is on the defendants who allege it. (a) But not only is the release not proved by them, but it is disproved

(a) *Paynes v. Coles*. pl. 2. 1 Munf. 373; *Beckwith v. Butler*, 1 Wash. 224.

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by the testimony of *Wilder*. There is no ambiguity, as is pretended, in the decretal order. It directs a specific performance of the agreement in all things; and the agreement so referred to is too plain to be misunderstood. It plainly means that they should pay, each of them, their two shares; that is \$1000. The Decree is in *personam*, as all Decrees were before the passage of the Act authorizing decrees in *rem*: but the power of decreeing in *personam* still subsists. *Id certum est, quod certum reddi potest*. If they did not know its meaning, that they were to pay \$1000 each, they could have applied to the Court during the Term: they could have ob-

(a) 2 *Eq. cases*  
*abr.* 279, *Ban-*  
*bury v. Bolton*;  
7 *Viner's abr.*  
399 *pl.* 19; 2  
*Eq. cases abr.*  
290, *Vaughan v.*  
*Blake*; 7 *Viner's*  
*abr.* 400 *pl.* 25;  
*Sheppard's Ex.*  
*v. Clarke and*  
*Wife*. 3 *Munf.*  
*p.* 29. *pl.* 1.

tained the requisite information by motion. (a) This case was open for the plaintiff, and consequently equally so for the defendants, if necessary for their interest. They could have obtained an explanation either during that Term, or after-wards: but they wanted none: it is a mere pretext, to evade the real merits, and to throw, if possible, the costs on the Appellee. Their subsequent conduct fully proves this. The notice, that a motion would be made to attach them for contempt, was accompanied with the copy of the Decree, and a statement of what they had to pay; the failure to do which was the ground of the motion. If they wanted information only, and were willing to obey the Decree, they could have paid, and shewn that performance in discharge of the motion. The order of the Chancellor to attach them was therefore correct. This principle of attaching for a contempt in not obeying a Decree is too well known to require authority to support it.

The execution of the Decree was under the control of the Court, and could not be abused to the injury of the defendants.

But if the agreement were ambiguous, (instead of being plain as it is,) it could nevertheless be decreed to be carried

(b) 2 *Eq. cases*  
*abr.* 17. *pl.* 6.  
*Allen v. Har-*  
*ding*.

into execution. (b) An agreement to build a House, though uncertain as to the time, size and value, was decreed to be specifically performed.

But, admitting the *release* to be unsupported, the defendants insist, that this is like an unpromising mercantile speculation, which they ought not to be compelled to join in. There is no similarity between this and such a mercantile pro-

just; and therefore this case must be governed by the general law of the land.

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A Court of Equity will decree a specific performance of a Contract or Agreement to enter into a partnership, even though relating to personalty. (a) *A fortiori*, will it enforce such an agreement relating to real estate. (b) Such an agreement ought to be certain, fair and just in all its parts. This undoubtedly is so. There is no doubt as to the intention: it is fair, and for public utility as well, as private emolument; and it is equal, and therefore just. It does not resemble the agreement, in the case of *Hercy v. Birch*, 2 Ves. 629, (c) of which the Court refused to decree specific performance, because the parties might dissolve the partnership immediately afterwards. This was a permanent partnership, and no party or number of parties could dissolve it, without the consent of all; for it respected *real estate*, and was not limited in point of time. (d) The property was to be held in fee simple; and all the partners are tenants in common. (e) In the case of *Lake v. Craddock*, 3 P. Wms. 158, the Heir and Executor of a delinquent partner was decreed to pay the deficiency of what his father ought to have paid, with interest. If he had not come in, he would have lost what had been advanced.

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(a) *Watson* p. 60.  
(b) *Buzton v. Liston & Cooper*, 3 *Atk.* 383.

(c) *Wats.* 60.


(d) *Ibid.* 72.  
(e) *Ibid.* 77.

If a general partnership is entered into for an unlimited time, it may be put an end to at any time by any partner, but not if he acts *mala fide*; or does it with a sinister view, or after some particular business is begun, or at an unseasonable time, which might occasion loss or damage to the partnership."

(f) This is the doctrine even in cases of partnerships relating not to real estate: the principle is stronger in cases of permanent partnerships like this. In *Watson*, p. 381., it is said that "a partnership for a term of years cannot be dissolved by the will of one, or of any number of the partners short of the whole of them:" a doctrine applying *a fortiori* to this case in which the partnership is permanent, requiring the possession of real estate *in fee simple*: it surely, therefore, cannot be terminated without the unanimous consent of all the partners; at least, until the object is attained by the completion of the building.

(f) *Ibid.* 379.

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If the Decree be reversed, the hostile defendants will have the plaintiff's property, and be rewarded for their violation of a solemn agreement.

*Leigh in reply.* This Decree is not what it professes, and was doubtless meant to be a Decree for specific performance. A Decree for specific performance ought to ascertain and fix, or provide some method for ascertaining and fixing the precise act to be done, or sum of money to be paid, which, being done or paid, will amount to the performance, the Court means to decree. Otherwise, it must be left to the parties to agree between themselves what act or payment shall be a specific performance; or each party must be left to ascertain that point for himself; in either of which cases, the Decree would leave the parties and the controversy exactly in the same state, it found them: or it must be left to one of the parties to ascertain the act or payment to be done or made by the other as a specific performance; which would be in effect a substitution of that party in the place of the Chancellor; and such is the character and effect of the Decree in this case. It is so general, and on that so uncertain, that the defendants could not know from the Decree itself what payments they were to make, or what act to do, in order to perform it.

The Decree directs that the defendants "shall in all things execute and perform their agreement, from time to time, according to its true intent and meaning." But what was its true intent and meaning, and what should be done to fulfil it, were the very questions litigated between the parties. Mr. *Bolling's* own notice to the defendants, requiring performance of the Decree on their part, is a direct admission of the uncertainty of the Decree itself; for that notice proceeds to point out (what the Decree omits) what the defendants should pay, in order to perform the Decree: but, if he was competent to do this, he is in effect the Chancellor, who decides the cause. By the arrangements between the parties, the money was to be paid in *quotas*, as called for; but the suit was instituted before *all* had been so called for; and it nowhere appears how much was due on the requisitions, that had been made at the time of the rendition of the Decree; consequently, it is not ascertained by the Decree what precise sum

ought to be paid as a specific performance; the whole or part. Of the consenting partners, *Harwood, Wilder and Walker* say they have paid only *part* of the whole amount of their subscription: *William and Henry Hazall* say they have paid \$540; and *Holloway's* Administrator says his Intestate paid \$450, only. Yet *Bolling* requires the refractory parties to pay the *whole* \$1000, on their subscriptions, with interest; and the Chancellor attaches them for not complying with this requisition, without any evidence that the consenting partners had paid the like sum, but *Bolling's* own statement to that effect. It is said this objection to the Decree was not made in the Court of Chancery: but it is unimportant whether it was there made, or not; and, besides, it plainly appears, from the Chancellor's Order, awarding the Attachment, that the objection was distinctly made. In the case of *Allen v. Harding*, cited from 2 *Eq. Cases abr.* 17, the Decree did provide a method for ascertaining precisely the act to be done, as the specific performance of the Contract.

Upon the *merits*. This association was without doubt a *partnership*; for, although partnerships are most commonly of the mercantile kind, yet, to constitute a partnership, it is not necessary that the object of the association should be to carry on trade. "*Contractus societatis est, quo duo pluresve inter se pecuniam, res aut operas conferunt, eo fine ut quod inde reddit huius ori inter singulos pro rata dividatur*:" *Puff.* lib. 5. c. 8.: which Mr. *Watson* translates, "the relation of persons agreeing to join stock or labour, and divide the profits." *Wats.* p. 1. This association was precisely an unincorporated company of partners, such as is described in *Wats.* p. 3.

I do not say that the agreement was not binding on the parties; I admit it was binding. I do not insist that the complaining parties ought to have been turned over to their remedy at Law; I admit their case was a proper one for relief in Equity. The parties should not have been driven to their legal remedy; because it is doubtful whether a Court of Law could entertain an action for one partner against another; and because, at all events, the case was proper for a Court of Chancery, to avoid multiplicity of actions at Law. The single question for the Chancellor to decide was, whether he should decree a *specific performance*? or decree *compensation* to

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the complaining partners against the refractory partners, ascertaining such compensation by an issue of *quantum damnificatus*? I insist that the latter was the proper, and the only proper, course.

(a) *Per* *Ld.*  
*Hardwicke in* *Joynes*  
*v. Strotham*, 3  
*Atk.* 388.

A specific performance was not the proper relief. The constant doctrine of the Court is, that it is in its *discretion*, whether, in such a Bill, it will decree a specific performance. (a) It is true that *Ld. HARDWICKE* said in *Buxton v. Listen*, 3 *Atk.* 383, that specific performance of articles of co-partnership ought to be decreed; but that was an extra-judicial *dictum*, and that doctrine is expressly over-ruled, and justly exploded, in *Hercy v. Birch*, 2 *Vesey jr.* 629, where Lord *ELDON* says, "no one ever heard of this Court executing an agreement for a partnership, when the parties might dissolve it immediately afterwards." The reason is obvious: it cannot be for the interest of any of the members of an association to be bound in a partnership with others, whose views, interests, wishes and feelings are hostile and conflicting. So, in the present case, what could be more absurd than to bind *Bell* in this partnership, when he had ceased to have any interest in promoting its prosperity, and had become very hostile; or *Powell*, who had a direct interest to disappoint the company from all profit from their Tavern; or *Birchett*, *Taylor*, *Cumming*, the representative of *Potts*, and *Walker*, who had all become averse to the farther prosecution of the project, for the reasons, they have assigned, and would therefore throw every obstacle in the way for the execution of it?

Again, specific performance ought not to be decreed; because the parties had themselves suspended the execution of their plan so long, (nearly three years,) that it might well have happened, in the *interim*, that it would be inconvenient and disadvantageous to some of the partners to go on with the scheme at so late a period. The Bill says a *majority* wished the suspension, and *Bolling* acquiesced in it, to his own injury and that of the Company. It does not appear, but that the now refractory partners were in that minority, opposed to that injurious suspension, and the now consenting partners in that majority, which insisted on the suspension. *Bell* certainly was in the minority on that occasion, for he is described in the Bill, as being the most zealous and active of them all at first,

and not to have become hostile 'till 1810. Suppose this were the true state of facts. Shall a specific performance be decreed, in behalf of those, who were opposed to it during a lapse of almost three years, against those, who were anxious at first for a prompt and immediate execution of the plan. (a)

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In truth, only the plaintiff *Bolling* and the defendant *Harwood* are now *desirous* of a specific performance: of the rest, some say only that they are *willing* to perform, though quite indifferent about it; and six others say they are averse to going on with the scheme. Now, surely, in a partnership like this, a majority might dissolve the company. Shall it be continued at the instance of a minority of *two*?

(a) *Hays v. Ca-*  
*ryll, 1 Bro. Parl.*  
*cases 127.*

The refractory partners broke off before any material part of the work had been done; so that little or no injury could have resulted to the rest from the abandonment of the plan by them. They broke off before *Bolling* had executed the Deed; as is proved by the plaintiff's own witness *Hawkes*; they broke off before the only efficient general meeting was held, that of April 1810; in short, before any thing had been done, except the removal of an old house by *Bolling*.

In every view, therefore, specific performance was not the proper relief; either on general principles, or on the particular circumstances of the case.

The remedy was plain; to decree compensation to those of the consenting partners, who had sustained injury by the refusal of the rest to abide by their agreement: and the mode of ascertaining the compensation was equally obvious, an issue of *quantum damnificatus*. *Bolling* had suffered an injury from the removal of his house, and the loss of the rents. The difference between the value of the house as it stood, and the value of the materials, after it was taken down, added to the rents he lost, was the precise amount of the damage, he sustained; and nothing could be more easily adjusted. As to the others, it is difficult to see how they suffered any injury, which could not be redressed by a release to the company of the shares of the refractory partners.

March 3d, 1817, Judge ROANE pronounced the Court's opinion, as follows :

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"The Court is of opinion that the first Decree is correct, which provides that the agreement among the proceedings should be carried into specific execution, and in effect allows that that execution may be perfected, on application to the Court, from time to time, by any of the parties interested, by means of an account or accounts, the sale of shares, or otherwise; as to all which, the Decree is considered as only *interlocutory*. But the Court is of opinion, that the Decree upon the *attachment* is erroneous, as it subjects the Appellants to that process, for refusing obedience to a Decree, which as yet remains general and uncertain, and the extent of which, as it relates to them, they had no adequate means to ascertain. The last Decree is therefore reversed with costs; and the cause is to be sent back, to be finally proceeded in pursuant to the principles of the first Decree, which are approved, as above, by this Court.

Decided, March  
5th, 1818.

Harrison's administrator *against* Raines's  
administratrix.

1. The assignee of a bond may recover of the assignor, after suing the obligor, and obtaining a judgment and execution with a return of *nulla bona*; notwithstanding his attorney directed that appearance bail be not required of the obligor.

ON a trial of an action of Assumpsit in the Petersburg District Court, in behalf of the administratrix of the assignee of a bond, against the assignor, on the ground that the assignee had sued the obligor, obtained judgment, and issued execution, on which there was a return of "no effects;" the plaintiff on her part offered in evidence a record of the action so prosecuted by *Allen Raines*, her intestate, in his lifetime; whereupon, the counsel for the defendant moved the Court to instruct the Jury, that the plaintiff, in that action, had not used due diligence to recover the claim from the obligor; "in this, that he *did not hold him to appearance bail upon the said writ*, which he ought to have done in order to maintain the present action;" (1) "and that the plaintiff, not having so held the said obligor to bail on the said action, therefore could not now maintain this action against the assignor of the said bond." The Court, being divided in opinion, refused to give any such instruction to the Jury; whereupon the defendant filed a Bill of Exceptions.

\* See Goodall v. Stuart, 2 H. & M. 105.

(1) Note. The plaintiff's attorney endorsed on the Writ, that "no bail was required of the defendant.

Verdict and Judgment for the plaintiff; from which the defendant appealed.

The cause was submitted without argument; and, on the 5th of March, 1817, the President pronounced the Court's opinion, that the judgment be affirmed.

## Allen against Parham and others.

Decided March 6th, 1817.

THE controversy in this case arose upon the construction of the Wills of *Richmond Allen* and *William Allen* of New-Kent County.

It appeared that *Richmond Allen* and *William Allen*, being brothers, each made his Will in the month of July, 1807. *Richmond Allen*, by his Will, directed that, if he should die before his brother *William Allen*, all his estate, both real and personal, should descend to him and his heirs forever, one negro man *Tom* excepted; but, in case his said brother *William* should die without a lawful heir, then it was his will that it should be equally divided between his brother *Wilson Allen*, and his nephew *Samuel A. Apperson*, to them and their heirs forever: he also gave the negro man *Tom* to *Wilson Allen* and his heirs. *Wilson Allen*, by his Will, in like manner, devised, that, in case he should die before his brother *Richmond Allen*, all his estate, real and personal, should descend to him and his heirs forever; one negro man *Sam* excepted; and in case his brother *Richmond* should die without a lawful heir, then it was his will that it should descend to his brother *Wilson Allen*, and his nephew *Samuel A. Apperson*, to them and their heirs forever: he also gave the negro man *Sam* to *Wilson Allen* and his heirs.

*Richmond Allen* died without issue, and in the life-time of *William Allen*. After the death of the latter, (who likewise died without issue,) *Wilson Allen* and *Samuel A. Apperson* took possession of his estate, (including what had belonged to *Richmond Allen*,) claiming the whole as their absolute property.

Act of Assembly, would have been turned into a fee simple; and the limitation over could not have taken effect; \**See* *Carter v. Tyler*, 1 Call 165; *Williamson v. Ledbetter*, 2 Munf. 521; and *Eldridge v. Fisher*, 1 H. & M. 559.

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*Henry Parham and Peggy his wife, Richard Allen, and Editha both R. Allen*, the other brothers and sisters of the Testators, filed their Bill, in the Superior Court of Chancery for the Williamsburg District, claiming an equal division of the estates in question, on the ground that, under the Will of *Richmond, William Allen* took an estate tail, which, by operation of law, was converted into a fee simple; and that, consequently, the devise over to *Wilson Allen*, and *Samuel A. Apperson* was void; that the bequest in *William's* Will was lapsed by the death of *Richmond* in his life-time; that the condition having failed, the bequest likewise failed; that, even if *Richmond* had survived *William*, his estate would have been an entail; and that *Wilson Allen* and *Samuel A. Apperson* could only take as heirs general.

The defendants, presuming that the Will of *William Allen* was the only one necessary to be looked into, contended that, as *Richmond* died in the life-time of *William*, a fact known to *William*, who possessed himself as devisee and legatee of *Richmond's* estate, the Court should read his Will, as if nothing were said of *Richmond*, and consider the bequests as immediate to the defendants, which they believed to be the plain intention of the Testator, who had evinced, most clearly, that they were, next to *Richmond*, the objects of his bounty: but, if that were not correct, yet, that a devise to one, with a limitation over to another, (as in this case,) of both real and personal estate in the same clause, if the first devisee died without heir in the life-time of the Testator, would be a good devise over.

Chancellor NELSON decreed a division of the lands, of which *Richmond* and *William Allen* died seized, among the plaintiffs and defendants, and also an account to be taken, of the rents and profits of the lands and slaves, and reported to the Court; from which Decree *Wilson Allen* appealed.

*Wickham* for the Appellant. Admitting the devise by *William Allen* in this case, to be of an estate tail, it never took effect; for *Richmond Allen*, the devisee, died in the Testator's life-time. The limitation over to *Wilson Allen* and *Apperson* was therefore good as an executory devise; though bad as a contingent remainder, the particular estate having never taken

effect. (1) In such case the remainder man will take, as if no devise in tail had ever existed. The Will operates as if the devise to him were immediate.

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*Writ contra.* If the devise of the estate tail fails, the remainder must fail also. The *substratum* failing, so must the *superstructure*.

March 6th, 1817, Judge ROANE pronounced the following opinion of this Court.

The Court perceives no error in the principles of the Decree : but there is no division of the *negroes* decreed, although an account of their hires is. The Court, considering the Decree, however, as interlocutory, and that a division may be hereafter decreed, does not think proper to reverse the Decree for this, but affirms it.

(1) Note by the Reporter. In 6 *Cruise's Digest* p. 513,—14, and in *Fawcett on Ex. Dev.* 492, the doctrine is laid down, "that, whenever a contingent limitation is preceded by a freehold capable of supporting it, it is construed a contingent remainder, and not an executory devise; but it is possible, that the freehold so limited may, by a subsequent accident, become incapable of ever taking effect at all; as, by the death of the first devisee in the Testator's lifetime; in which case, the subsequent limitation, if the contingency has not then happened, will be in the same condition at the Testator's death, (that is, at the time when the Will is to take effect,) as if it had been limited without any preceding freehold. Now, in this case, it has been held, that, where such subsequent limitation could not vest at the Testator's death, it should enure as an executory devise rather than fail for want of that preceding freehold, which had never taken effect." And such was the decision in *Hopkins v. Hopkins*, *Cases Temp. Talbot*, 44; 1 *Atk.* 581; 1 *Vezey sen'r.* 269. But it may be remarked, that, in this case, upon the death, without issue, of *Richmond Allen*, the devisee in tail, the contingency, upon which the limitation over was intended to take effect, actually happened, if it ever did; yet, since, at that time, the remainder men could not take, (because the deviser was then living,) they could not take at all; for no time was appointed by the Will, for them to take, but that of the death of *Richmond Allen*, without issue. It seems, however, that the contingency never happened at all; for, by the express words of the Will, the devise to *Richmond Allen* was only in case he survived the deviser; and the limitation over must, of course, have been intended to operate in the event of his dying, thereafter, that is, after taking the estate, without issue. The event of his dying, in the life-time of the Testator, without issue, was not provided for in the Will.

Decided, March 6th, 1817. **Matthews Executor of Garnett against Noel and others.**

1. A Testator directed that, *after his debts were paid*, all his slaves, &c. be furnished for three years from his estate, to raise certain pecuniary legacies, by working his plantation called "Farmer's Hall," which he then specifically devised: in such case, those Legacies were no farther chargeable on the slaves, &c. than on such part thereof as should remain after the payment of debts and expenses of administration, and of a general charge on the estate by another clause in the Will; and therefore must abate so far, as the same were not raised within the three years, by the use of the said residue of slaves, &c. on the Farmer's Hall Plantation; with liberty to sever, and apply to that use, any crops on the ground at the expiration of the said term of three years.

THE Appellees, in August, 1815, filed their Bill, in the Superior Court of Chancery for the Fredericksburg District, against the Appellant and Robert Garnett; stating, that Henry Garnett, Testator of the Appellant, departed this life about August, 1811, having by his Will devised as follows: "After my debts being paid, that all my slaves, work creatures, plantation utensils, and provisions sufficient for their support annually, be furnished for three years, from my estate, to raise the sum of five hundred pounds for Nancy and Austin Garnett, children of Austin Garnett, (two of the Appellees,) and also five hundred pounds to be equally divided between the children of Robert Garnett, (the other Appellees;) after that sum being raised by working the plantation called Farmer's Hall, I then devise the said plantation, one half to Robert Garnett, (one of the defendants,) and the other half to Nancy and Austin Garnett," (the legatees before mentioned:) that, by the said Will, several persons were named Executors thereof, with a direction that no security should be required of them; and, by a Codicil, the Appellant Thomas Matthews was also named an Executor: that the Executors named in the body of the Will refused to qualify, and the said Matthews alone took probate thereof, and was permitted by Essex County Court to qualify without security; that he as Executor possessed himself immediately of all the real and personal estate of the Testator, claiming to hold the real estate, and especially the plantation called "Farmer's Hall" in virtue of the clause aforesaid: that he hath sold off the perishable estate of considerable value, and had ever since retained all the real estate, negroes, &c. and received all their profits: that the three years mentioned in said clause had elapsed, and that much more than a sum sufficient to pay the said legacies, had been raised by working the said plantation called Farmer's Hall; that, though this was the case, the Appellant had not paid any part of the legacies, and, though frequently required to surrender the said plantation to the devisees, in order that partition might be made, he still retained the possession of it:

2. What accounts ought to be taken in such case, before a decree, for payment of those legacies, ought to be pronounced.

that the Appellants had misapplied the profits of the real and proceeds of the personal estate; that he had little or no estate, and was unable to reimburse the sums, so misapplied, to the parties entitled thereto.

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The prayer of the Bill was, that the Appellant might be restrained from receiving the future profits of the estate, unless he gave ample security for the faithful application of them; that he might be compelled to surrender the estate called Farmer's Hall, in order that partition thereof might be made, according to the direction of the Will, between the plaintiffs *Austin* and *Nancy*, and the defendant *Robert Garnett*; that he might render an account of the profits thereof, and be decreed to pay the plaintiffs their respective legacies aforesaid, with interest from the time they ought to have been paid; and for general relief.

To this Bill, the Appellant filed his answer, admitting most of the allegations, but controverting the construction of the Will contended for by the plaintiffs; stating that he had been advised that the proper construction thereof was, not that the plantation should be worked, &c. for three years *after the Testator's death*, but for and during three years *after the Testator's debts were paid*; and, as the debts had not been paid, the defendant had continued the cultivation of the estate; denying that he had been able to raise a fund sufficient to pay the debts and legacies; and alleging that, in consequence of the Embargo and the War, but little profit had been made from the estate.

The plaintiffs replied generally to this answer. The Bill was taken for confessed as to the defendant *Robert Garnett*.

In the Will of the Testator, (which was made an Exhibit in the cause) there was a provision that *Hannah S. Neale* should "have liberty to live in the mansion house, to have full use of all the land, houses, &c. from the cross fence, running from *Lydia Brook's* to the White Oak Swamp, during the term of three years; that, (after raising the legacies to the plaintiffs,) *Maria, Washington, and Fenton Mariner*, a son and daughters of *Anne Mariner*, should have, in young negroes, to the amount of five hundred pounds, &c.; that, if, from his personal estate, more money was raised than would discharge his debts, it be laid out in lands or young negroes,



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" as might be judged best by his Executors, for the interest of  
" his legatees, &c.; that *Hannah S. Neale* be furnished with a  
" sufficient quantity of stock for her use, and the use of her  
" family; that every necessary be furnished her by his Exe-  
" cutors, so that she might never want, and that whatever  
" timber she might want, and firewood, be furnished her from  
" the rest of his lands."

An account of the Appellant's Executorship, made out by Commissioners, appointed by the County Court of Essex *since the institution of the suit*, and approved by that Court, was also exhibited; according to which, it appeared that the Appellant had sold produce from the estate to the amount of upwards of 2000*l.* which he claimed to have disbursed in the payment of debts, and some legacies, particularly that to the *Mariners*; and a balance of 339*l.* 15*s.* 3*d.* appeared to be due from the estate to him.

Sundry affidavits were read, on the hearing, without exception. The principal facts proved, were that the Appellant had very little property; that *Farmer's Hall* was a valuable and productive estate; the smallest estimate of its annual product being 500 barrels of corn, and 700 bushels of wheat; and that the Testator had a large personal estate, there being fifteen crop hands, &c.

Chancellor NELSON decreed, that the Appellant should, after the 1st of January, 1817, surrender the estate called *Farmer's Hall*, to certain Commissioners, for the purpose of partitioning the same between the plaintiffs *Nancy* and *Austin*, and the defendant *Robert Garnett*, according to the directions of the Will; that he should pay to the plaintiffs the legacies, that by the Will were to be raised by working the said estate called *Farmer's Hall*, with interest thereon from the date of the decree; " *it being manifest from the account he exhibited, that more than the amount of those legacies had been so raised;*" that a Commissioner should take an account of the monies so raised, for the purpose of ascertaining the time, when the amount of them reached to 1000*l.* and inquire what was a reasonable rent of the said estate, since the said sum was so raised; reserving to the plaintiffs the liberty of applying for a decree, (when the account should be reported,) for an equivalent for the interest on their respective legacies, from the time

they should be thereby shown to have been raised, to the time from which interest was by the decree given thereon.

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From this Decree an appeal was allowed by this Court, on petition of the Appellant; in which petition, the decree was alleged to be erroneous, for the following reasons:

1st, Because, by the terms of the Will, the lands, slaves, &c. were to be worked three years *after the debts were paid*; plainly importing that the *debts* were *first* to be paid.

2d, Because, even if the Will admitted of a different construction, the slaves, stock, &c. were assets in the hands of the Executor, for the payment of the Testator's debts, and their profits ought by law to be applied to the discharge of debts, even contrary to the intention of the Testator, if he had intended to prefer his legatees to his creditors.

3d, Because, if these profits had been improperly applied to the payment of debts; yet, as those debts were all of them chargeable on the personal estate, and many of them chargeable on the real, the Executor, being defendant in Equity, was entitled to stand in the place of the creditors, whose claims he had satisfied.

4th, Because it was evident that the Executor acted for the benefit of all parties, by keeping the estate together, instead of selling the personal property, as he ought to have done, for the payment of debts, in which event there would have been no fund for the legacies claimed by the plaintiffs.

5th, Because, on the principles contended for by the plaintiffs, no decree for the payment of any sum of money, or for delivery of possession of the land ought to have been rendered, until an account was taken of the Executorship, that it might appear how much of the *mixed fund*, consisting of the profits of the lands, slaves, &c. was to be credited to the *lands*; how much to the *slaves and other personal estate*; and what fund there was for the payment of the other *legacies*.

The Petitioner also submitted a question, whether the other legatees, who were concerned in interest, ought not to have been parties.

Wickham for the Appellant, argued in support of these positions; and, in discussing the third point, referred to *Epps v. Randolph*, 2 Call, 125—190; *Tinsley v. Anderson*, 3 Call 329—

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*Stanard*, for the Appellees, insisted, 1st, That by the Will, there was only an *implied* charge on the estate called Farmer's Hall, for the payment of *debts*; a charge, which operated on the land in the hands of the *devisees*, in the event, that the *personal estate proved inadequate to the payment of debts*, but did not put the said estate into the hands of the *Executor*, that its profits might be applied to exonerate the personal estate from

(a) *Bondlar v.* the payment of *debts*. (a)

*Smith, Prec. Ch.*

264; *Tompkins*

*v. Tompkins, Ib.*

307; *Hazlewood*

*v. Pope*, 3 *P.*

*Wms.* 324; *Bick-*

*nell v. Page*, 2

*Atk.* 79; *Bridge-*

*man v. Dove*, 3

*Atk.* 202; *Earl*

*of Inchiquin v.*

*French, Amb.*

33; *Duke of An-*

*caster v. Mayor*,

1 *Bro. Ch. Rep.*

454.

2d. The Appellant was not entitled under the Will to hold the estate called Farmer's Hall for *any* purpose; (unless to take the crop growing at the death of the Testator;) the effect of the Will, on a sound construction of it, being to charge the land, in the hands of the *devisees*, with the 1000*l.* to be raised from it, with the assistance of *such of his negroes, work crea-* *tures, &c. and provisions for their support*, as, after the *payment of debts*, could be furnished for that purpose.

3d. If the *Executor* had, under the Will, any interest in or control over the said estate, it was limited to the object of raising the 1000*l.* for the *legacies*, and to the *time of three years* for the attainment of that object.

4th. Even if the *Executor* could hold the estate longer, than three years, to raise the 1000*l.* yet it was competent to the Court of Chancery, without the interposition of an account before a Commissioner, to inquire into and ascertain the fact whether it had been raised; and, as the account *he exhibited*, shewed, manifestly, and on its face, that a much larger amount, than that sum, had been raised, it was proper for the Court, this fact being so *ascertained*, to decree as well payment of the *legacies*, as the surrender of the land; especially under the circumstances that the *Executor* was of very limited responsibility, and the account and evidence shewed many acts of mal-administration.

5th. As to *parties*, it appears from *Coop. Eq.* p. 39, that all the Legatees need not be parties, except where a *residuum* is to be divided. (1)

(1) Note. See also *Branch's Adm'z. v. Brooke's Adm'r.* 3 *Munf.* 43.

March 6th, 1817, Judge ROANE pronounced the Court's opinion.

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"The Court is of opinion, that the debts of the Testator were not to be paid out of the profits of, or chargeable on, the real estate, in exoneration of the personal."

"The Court is farther of opinion, that the legacies of 500*l*. to the children of *Austin Garnett*, and the like sum to the children of *Robert Garnett*, were no farther chargeable on the slaves, and other personal estate, directed to be used on the plantation called Farmer's Hall, than on such part thereof as should remain, after the payment of *debts* and the expenses attending the administration, and after a sufficient provision being made for the use of *Hannah S. Neale* and her family; and that those legacies must consequently abate, so far as the same were not raised, within the term of three years limited therefor, by the use of the said residue of slaves and personal estate, and the Farmer's Hall plantation aforesaid; which term of three years ought not to commence until the 1st of January, 1812; with liberty to sever, and apply to that use, any crops on the ground at the expiration of said Term, after which, the Appellant should be answerable to the devisees of that plantation for a reasonable rent, until the same is delivered up."

"The Court is farther of opinion, that there is no error in so much of the Decree of the Chancellor, as directs a surrender of the said plantation, and a partition thereof; but that so much of the said decree, as directs the legacies aforesaid to be paid *before the proper accounts were taken*, and the residue thereof, so far as it may conflict with the principles hereby established, is erroneous."

"The Decree therefore, so far as it is thus declared to be erroneous, is reversed with costs, and the residue thereof affirmed; and the cause is remanded to the said Court of Chancery, to have accounts taken, as well of the Administration, by the Appellant, of the goods of his Testator, as of the proceeds of the Farmer's Hall Plantation, and excess of the slaves and personal estate aforesaid; (in which *latter account*, the Appellant must have *credit* for a reasonable hire for such of the slaves, and other personal estate, used on said plantation, as he would have been justified in selling for the payment of debts, and his commissions as Executor, or in hiring out, to

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raise the provision to be furnished *Hannah S. Neale* and family; for both which purposes, the Commissioners are to set apart a sufficient fund; the hires of which slaves, and other personal estate, are to be credited as aforesaid, and charged to the Appellant in his *Administration account*; and to be farther proceeded in, according to the principles above declared, in order to a final decree.

Decided, March  
7th, 1817.

### Horner against Marshall's administratrix.

1. It is a sufficient ground of equity for a perpetual Injunction to a Judgment in slander, that, at the time of speaking the defamatory words, and when the Judgment was obtained, the complainant in the Bill (who was defendant at law) was insane, or in a state of partial mental derangement on the subject, to which those words related.

GUSTAVUS B. HORNER presented a Bill to the Chancellor of the Richmond District, praying an Injunction to stay proceedings on the two Judgments obtained against him, for defamation, by *Charles Marshall* and by *Charles Marshall and wife*, which, after the death of the said *Marshall*, had been revived by actions of debt, instituted by his widow and administratrix.

The grounds of Equity stated in the Bill were, in substance, that the complainant, at the time of speaking the words, for which the actions of slander were brought, and when the Judgments were obtained, was in a state of *partial mental derangement*, occasioned by a domestic calamity; that *Marshall* himself was convinced of this, and, contented with receiving the costs only, declared his intention never to demand the damages recovered by those Judgments, which lay dormant from the year 1797 to 1807; but no written release was ever executed.

Chancellor TAYLOR *refused*, but the President of the Court of Appeals (Judges ROANE, BROOKE, and CABELL concurring, Judge COALTER being absent,) *granted* the Injunction.

The cause was heard on the Bill, Answer, Exhibits and Examinations of Witnesses, by which the allegations in the Bill, in relation to the partial mental derangement of the complainant, were amply supported; it appearing that, *on the subject, to which the defamatory words related*, he was insane, though his mind was sound in other respects. It appeared, also, in evidence, that *Marshall refused to release* the Judgments to *Horner*; determining to hold them as a security for his future good behaviour; though he repeatedly expressed an intention not to demand the money, and that his children never should receive it; and, sometime after the Judgments were obtained,

**Horner and Marshall** were publicly reconciled, and shook hands as a token of renewing their former friendship.

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Chancellor TAYLOR dismissed the Bill with costs, from which Decree the complainant appealed.

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The case was submitted here without argument; and, on the 7th of March, 1817, the Court reversed the Decree with costs, and, proceeding to make such Decree, as the Chancellor should have rendered, directed the Injunction to be re-instated and made perpetual; but, on the circumstances of the case, that the Appellant pay the costs in the Court of Chancery.

### Pickett and Wife and others *against* Chilton.

Decided, March  
11th, 1817.

ON the 27th of October, 1803, upon a contemplated inter-marriage between the Appellee and Mrs. *Felicia Chilton*, the widow of *Orrick Chilton* deceased, who was possessed of a considerable personal estate, and had then living two children by her first husband; a Deed of Trust was executed by the said parties, reciting an agreement between them, "that *John Chilton* (the Appellee) should, after the said intended marriage and wife should enjoy the profits during the coverture; and, afterwards, that the assign, transfer and pay over all the said property (that might remain) to the wife in case she survived the husband; but, if she died before him, then to such person or persons, as she should, notwithstanding her coverture, appoint by Deed or Will, "to the intent that the same might not be at the disposal of, or subject to the control, debts, forfeitures or engagements of the husband;" with a provision that, in the event of her surviving him, and claiming any part of his estate, by right of dower or otherwise, the Trustees should hold for his benefit and that of his executors, &c.; but without any provision for the event of his surviving her, and her failing to make any appointment. The husband having survived the wife, who made no appointment, was entitled to the property as her administrator, and not compelled to make distribution to her children by a former husband.

1. Construction of a marriage settlement, by which the personal estate of the intended wife was conveyed to Trustees for her use until the marriage; then, upon trust that the husband

2. The Clerk's stating in the transcript of the Record, that certain Answers, which are filed, and copied in such transcript, were not noticed by the Court, is not to be relied upon by the Appellate Court, if the contrary may be inferred from the Decree itself.

3. If the caption of the Decree names, as defendants to the cause, certain persons whose Answers are filed, and the Decree states that the cause was heard upon the Bill, Answers and Exhibits; it may be inferred that the Answers of those persons were noticed by the Court.

4. The only effect of the omission of a Replication to an Answer is that all the facts stated in such Answer are admitted. See *Kennedy v. Baylor*, 1 Wash. 163.

5. It is not a sufficient ground for reversing an interlocutory Decree, that no day was given to an infant defendant to shew cause against it, after he should come of age; because such omission may be corrected in the final Decree.

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"riage, receive and enjoy, during the joint lives of them the said John Chilton and Felicia Chilton, the interest and occupation of the said personal estate, and also that the same, and the interests and profits thereof from and after the decease of such of them the said John and Felicia, as should first happen to die, should be at the sole disposal of the said Felicia, notwithstanding the coverture;" and that, if Felicia Chilton survived the Appellee, she should have no part of his real or personal estate, by virtue of her title to dower, or as his administratrix: in pursuance of which agreement, and in consideration of three dollars paid to Mrs. Chilton by the Trustees, she conveyed the whole of her said personal estate to George Christopher and Thomas Chilton, their Executors, &c., upon trust, "for Felicia Chilton, and her assigns, until the solemnization of the marriage, then upon trust, that they the said Trustees, their Executors, &c. should permit the said John Chilton and Felicia Chilton, his intended wife, to have, receive and enjoy all the interests and profits of the said property, assigned to and for his own use and benefit, and from and after the decease of such of them, the said John and Felicia, as should first happen to die, then upon trust, that they the said Trustees, &c. should assign, transfer and pay over all the said property (that may remain) to the said Felicia Chilton in case she survived John Chilton, but, if she died before him, then unto such person or persons, and at the time, and in the proportions, as she the said Felicia should, notwithstanding her coverture, by any writing or writings, under her hand and seal, attested by three or more credible witnesses, or by her last will and testament, in writing, to be sealed, &c., and published before the like number of witnesses, direct, limit or appoint: to the intent that the same might not be at the disposal of, or subject to the control, debts, forfeitures or engagements of the said John Chilton." Then followed a provision that, in the event of her surviving him, and claiming any part of his estate, by right of dower, or otherwise, the Trustees should hold for his benefit, and that of his Executors, &c.

No provision was made in the Deed for the event, which afterwards actually occurred, of the Appellee's surviving his wife, and her failing to make any appointment.

After *Felicia Chilton's* death, *George Christopher* took a dministration on her estate, and as administrator or as trustee, continued to hold the property and receive the profits, and so continued to hold at the time the suit was instituted, except that he sold some of the property to *John Chilton* himself. This administration was afterwards revoked, and granted to the Appellee. Her children by her first husband, together with *Steploe Pickett*, (who intermarried with one of them,) claimed and afterwards had possession of the balance of the property included in the said Trust Deed.

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The Appellee, in 1810, about four years after the death of his wife, brought suit in the Chancery Court of Williamsburg, against the Trustees of those infant children, to recover the said property, and set forth in his Bill the foregoing circumstances; also alleging that he neither knew himself, nor was able to prove the number of the negroes, stock, &c., or the quantity and value of the other personal property, of which the Trustee *Christopher* had possessed himself under the Deed, or to what amount they had increased. He therefore prayed a discovery, and to be relieved, &c.

*Thomas Chilton* was appointed guardian *ad litem* to the infant defendants; and the answer of *Felicia A. C. Chilton*, by her said guardian, was filed among the papers in the cause, but was said by the Clerk, in the transcript of the Record, not to have been "noticed in the proceedings at rules, or in Court."

The Chancellor granted an Injunction, restraining the defendant *George Christopher* from disposing of, or otherwise making away with any of the property, mentioned in the Deed, and also enjoining him, and all others concerned, from proceeding in a suit against the complainant, in the County Court of Westmoreland; for the amount of his, the complainant's, purchase of property of the said *Felicia Chilton*, sold by the said *George Christopher*.

The defendant, *George Christopher*, in his Answer stated that, at the request of *Felicia Chilton*, and with the consent of *John Chilton*, he drew the Deed of Trust in question, on the day of their intended marriage; that he was directed by both parties to draw it so that, on the death of either, the survivor was to have no interest in, or control over, the estate of the one first dying; but that, in consequence of his want of skill



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as a draftsman, and his being greatly hurried in making the draft by the knowledge that the marriage was delayed only, 'till the contract was finished, he omitted to insert in the Deed a clause, providing that in the event of Mrs. *Chilton's* dying before her husband, he should have no interest in, or control over, her estate. The Respondent averred, however, that the Deed was understood by both parties as having that effect; that, so strong was the impression of *John Chilton*, the complainant, that such was its meaning, that he even solicited the Respondent to qualify as administrator of the estate of *Felicia Chilton*, and, at the sale of her estate by him as administrator, purchased of her perishable property to the amount of 105*l*; and, in January following, when the trust negroes were hired out, having been also previously advertised by this defendant as Trustees and not as administrator, the complainant attended the hiring thereof, and assisted this defendant in carrying on the same, by distinguishing the trust negroes from others, and became a security in some of the bonds, taken at the said hiring, and at neither sale, nor hiring did he the complainant, in the slightest manner state any claim to the said property, or any of it; that when the time of credit, allowed by this defendant on the sale of the trust property, had expired, he instituted the suit against the complainant for the purpose of recovering the amount of his purchase at the sale aforesaid, and *after that* he heard of the claim of the complainant, as set forth in his Bill.

The defendant farther stated, that, by mistake, he included in the Deed four negroes, to which he then had himself the legal title, the nature and grounds whereof, he set forth at length; claiming them as his own.

*Stephoe Pickett* and *Sarah Orrick* his wife, late *Sarah Orrick Chilton*, filed their Answer contending that, under the Deed, they were entitled to one half and *Felicia A. C. Chilton* to the other half of the property, of which their mother *Felicia Chilton* died possessed.

The deposition of *George Christopher*, to the same effect, with his Answer on the subject of the omission in writing of the Deed, was taken and filed; but endorsed, "excepted to by the plaintiff, because there was *no order for taking it*, the deponent was a party *interested*, and incompetent to give evidence in the cause."

Sundry other depositions were taken, some with a view to prove what was the intention of the parties to the Deed, from parol declarations of the husband, and others, upon collateral points.

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The cause came on to be heard in Fredericksburg, (to which Court it had, in the mean time been transferred by law.) on the 19th of September 1815, and the Chancellor, by an interlocutory Decree, ordered that the complainant should recover the slaves and other property, included in the said Deed, and that the Appellants should deliver them up, and that *Christopher*, the Trustee, should, for the time he held them, account for their hires, &c.

From this Decree, the defendants, *Pickett* and *wife* and *Felicia Anne Corbin Chilton*, upon their petition, were allowed an appeal to this Court.

*Leigh*, for the Appellants. The decree is founded on the opinion, that, as the marriage settlement, of October, 1803, contains no declaration or limitation of trust, beyond the duration of the coverture of *John* and *Felicia Chilton*, the remainder of the estate thereby settled, in the event, which has actually happened, of the wife dying without exercising her power of appointment over the settled estate, is in no wise affected by the settlement; and her husband is entitled to it, either *jure mariti*, or as administrator of his deceased wife. But I contend, that, according to the just construction of the settlement, taken by itself, and without regard to extrinsic evidence, the wife ought to be considered as a *feme sole* in respect of all the settled estate; that her husband, by that deed, renounced all his marital rights, whether to accrue before or after the coverture determined, and his right of administration among the rest; and consequently, that the settled estate devolved to the defendants, the only children of the wife.

The stipulation on the wife's part in favour of the husband, expressed as the consideration that moved him to this settlement of *her* property, was, that she would by the same instrument, renounce all benefit of his estate to be acquired by the marriage; as, dower of his real, distribution of his personal, and even the right of administration on his estate, should she survive him. Hence, it is a natural and just construction of

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the corresponding stipulation on the husband's part in the wife's favour, (viz. that her property should be at her sole and only disposal, *notwithstanding* the coverture) that, as it is correlative, so it was intended to be co-extensive with the preceding stipulation on her part, in his favour, in respect of his estate. Fairness and reciprocity was undoubtedly intended at the time; but there will be no reciprocity, if the Chancellor's construction obtain.

That the husband meant by this deed, to renounce all interest in the settled estate, that he might acquire *jure mariti*, and indeed to claim no interest in it, but what he took under the deed, is apparent from another consideration. It is declared, that the profits of the settled estate should enure to his use during the coverture: a provision wholly unnecessary, if his present pretensions are correct; for, by mere force of his marital rights, he would have been entitled to enjoyment of those profits during the coverture, unless there had been some express negative stipulation to the contrary. Therefore, this express affirmative stipulation on that point, forestalled and

(a) *Robinson's administrator v. Brock. 1 Hen. and Munf. 213.* waived (a) his general rights as a husband, in respect of the settled estate, *during* the coverture, much more *after* it. It shews, that the only interest, the parties intended the husband should take, should be derived to him from the grant, contained in the deed, and not from any general marital right.

It is expressly declared in the deed, that it is made, to the intent that the settled estate may not be at the disposal, or subject to the control, &c. of the husband. That it should not be at his disposal, or subject to his control, when? *After* the coverture: for it is expressly provided just before, that *during* the coverture, he shall, jointly with the wife, have possession of the estate, and he alone enjoy the profits. True, this covenant is not drawn out in technical form: but to make a good covenant no formality is required. It is still a covenant on the husband's part, and binding on him, however awkwardly expressed; a covenant, of which I humbly suppose the plain necessary construction is that, I give to it; which, if considered as executed by this deed, is a direct bar to the pretensions the husband now sets up; which, if executory, the Court will compel him to execute.

This covenant on the husband's part, in the wife's favour, is followed by one on her part in his favour, which makes it quite clear, in my apprehension, that, according to the true intent and effect of this deed, the husband thereby renounced his marital rights, in respect of the settled estate, in the event that has actually happened. There is one event, very different from the actual case, in which it is provided, that his marital rights shall be restored to him: it is provided, that if the wife should ever claim and recover any part of the real or personal estate of the husband, as dowress of the real, or distributee of the personal, or as his administratrix, in that case the trustees shall stand possessed of the whole of the settled estate, in trust for him, his Executors, &c. *Expressio unius est exclusio alterius*. Here is one case, and only one, in which the husband stipulates that his marital rights shall avail him. He waives and renounces them, therefore, in every other event.

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As against the infant defendant, the proceedings are certainly irregular. There is no replication to her answer. And this decree, deeply affecting her interests, and final, I presume, in respect to her, gives her no day after her attainment to full age, to contest the decree.

*Parker for the Appellee.* The general right, which a husband has to the personal property of his wife, in the event of his surviving her, and becoming her administrator, free from the obligation of distribution, is not questioned, and is unquestionable.

The only question then, in this case, is, whether the Appellee by the deed of October, 1803, has waived or renounced his rights in the event, which has occurred.

The counsel for the Appellants, (Mr. Leigh) admits there is no *express* waiver, and that no *express* provision is made for this case, although there is such provision for almost every other possible case. But he contends that, by comparing the several clauses of this deed with each other, it will appear to have been the manifest intention of the parties, that the husband, by the deed, should renounce *all his marital rights*, and that the Court ought to effectuate such intention; because,

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1st. The wife renounced all her rights to his estate ; and it was reasonable the stipulation on the husband's part should be reciprocal ; and that the Court should so construe it.

To this I answer. That the deed must be construed according to the stipulations on the face of it, and not according to the reasonableness or unreasonableness of its provisions, to be ascertained by extrinsic matter.

In this case, before the Court can say that the agreement was unreasonable, they must look to the situation of the parties, *dehors* the deed.

If the wife had a large property, and the husband none, the agreement would not be unequal, because the husband would be surrendering his marital rights, during coverture, and his right as survivor, if she chose to make an appointment, for her right, in the event of surviving him, to nothing.

So, if the wife had a large personal, and the husband only real estate or slaves, the husband is giving his immediate interest in a fee simple for her possibility for life.

The reasonableness and *reciprocity* of the stipulations would then depend on the amount and nature of the estates respectively.

If, as would seem from this deed, the husband as well as the wife had some property, still the husband could not reasonably be expected to give up *all his marital rights*, entitling him to a fee in the whole, for her possibility of a life estate, in the event of her surviving him.

Such a stipulation is neither *reasonable* nor *reciprocal*, and therefore nothing on this account is to be presumed against the husband.

But, 2dly, says Mr. Leigh, the husband has renounced his rights, because the deed stipulates that, during the coverture, he shall have the interest and profits of the settled estate ; a provision which would have been (as the counsel contends) wholly unnecessary, if his present pretensions are correct.

The answer is obvious. The legal estate, by the deed, passed to the Trustees ; and, if this provision had not been made, so far from the husband's taking, during the coverture, or during the existence of the trust, any thing *jure mariti*, he would have taken nothing. His right to take *jure mariti*, was re-

vived only when the trust ended, which, by her death without appointment, (he surviving her,) did end.

Again; the declaration in the deed, that its stipulations were made with the intent that the property should not be at the disposal or subject to the control of the husband, is relied on; because it must, (as the counsel argues) be intended to mean that, *after the coverture*, it should not be subject to such disposal or control; since, *during the coverture*, the husband has a right to the enjoyment of the property; a provision incompatible with the Appellee's claims.

On examining this part of the Deed, it is evident that the declaration is intended to apply *during the coverture*; and *after the coverture, if she makes an appointment*. That is, the husband's power of disposing of the estate, although he may take the profits, is controlled during the coverture, and *after, if the wife chooses to exercise her power of giving it from him, and in no other case*.

The mistake of Mr. Leigh is in assuming the proposition that, during the coverture, the property, by the deed itself, was under the control, and at the disposal of the husband, and that therefore a provision to restrain him, would have been incompatible with the other stipulations of the deed.

Lastly, it is contended that the covenant of the wife, that, if she survived the husband, and claimed any part of his estate, the Trustees should hold for him, his Executors, &c. excludes the idea that his rights were to revive in any other case, "*Expressio unius est exclusio alterius*."

Upon examining the deed, it will be seen why this covenant was introduced, and what its operation was plainly intended to be. It was intended not to exclude the husband's right in cases not enumerated, but to prevent her from claiming both estates. It was operative only in the event of *her surviving him and claiming his estate*. It could not therefore be intended to affect his rights in an event very different from the one mentioned, viz. *his surviving her*.

To support all his reasoning, Mr. Leigh cited *Robinson's Adm'r. v. Brock*, 1 H. & M. 213.

The cases are entirely unlike in their circumstances, and in the general reasoning of the Judges.

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In that case the property was to go to the *survivor* during life; and then to the heirs of the husband and wife, respectively, if the wife made no appointment. The case turned in part upon the technical meaning of the word "*heirs*," which the Court seemed to think could not be applied to the husband, (see Judge TUCKER's opinion, p. 223, 224,) and partly upon the circumstance, that the husband, if he survived the wife, was, by the deed itself, to take a life estate; and here the maxim of Mr. Leigh of "*Expressio unius*," &c. applied. See Judge ROANE's opinion, p. 227.

In the case at Bar, both these important circumstances, upon which the case of *Robinson's Administrator v. Brock*, essentially turned, are wanting.

The Appellant's construction, therefore, is neither supported by any good reason, nor by authority.

There are several clauses in the deed, to show that the Chancellor's construction was the right one.

1. The case, which has occurred, is entirely omitted, both in the recital and body of the deed, which could scarcely have happened accidentally.

2. It is expressed, *that if the wife die before the Appellee*, the Trustees should hold; for whom? for her *heirs*, or her *children*? No: for her *appointee*, if she chooses to make one. This provision, for that very event, excludes any other, *in the same event*, and here Mr. Leigh's maxim most completely applies.

3. The children, who are said to be entitled by the stipulations of this deed, are not once named in it. The Court, but for extrinsic evidence, would not know there were any such; and, I contend, it must construe this deed without reference to that circumstance.

4. The wife in making the appointment, is tied up to certain formalities.

For whom and for what purpose? for the benefit of the children who are not named, and whom the Court cannot notice? or for the benefit, and at the instance of the husband? plainly the last. The case of *Ross v. Ever*, 3 Atk. 156 and 163, is in point, and shews the motive on the part of the husband, generally, in making these restrictions.

Suppose the wife had made an appointment, but not in the manner pointed out by the deed? The husband might certain-

ly have taken advantage of her failing to comply with a covenant, introduced by himself, and for his own security.

This case is like those cases in England, where the wife has a separate estate, and fails to make an appointment.

In such cases the wife may appoint, although there be no stipulation in the deed authorizing it.

If she does not, the husband, as survivor, takes. (a)

So in the case of *Fettiplace v. Gorges*, 1 *Vesey jr.* 46, Where the wife had a separate estate, free from the control, debts, &c. of the husband; the Chancellor said, if she had failed to make an appointment, the husband would take.

These cases, and particularly the last, are decisive of the case at bar; because, in both, the wives had separate estates, free from the control, debts, &c. of the husbands; with a power of appointment in the one case, by deed, and in the other, by the principles of law. In both they failed to make the appointment, and the husbands took as administrators, or next of kin.

So much upon general principles. To the objection that the decree has not given to *Felicia A. C. Chilton* a day after she comes of age to shew cause against it; I answer, the decree is only interlocutory.

When it is made final, the Appellant *Felicia* will be given a day; and if it is to be considered as final in regard to her, this Court would now do what the Court of Chancery ought to have done, and only alter the decree in this particular.

*Standard on the same side.* Mr. Leigh's view of this case is a novel one. The cases in England of settlements to the separate use of the wife are very numerous; yet, though from his known diligence, he has not failed to make researches, his acuteness has discovered no case in which the reasoning of the Bar or decision of the Court supported him in the ground he has taken. Indeed settlements to separate use afford a stronger argument in favour of his construction than this case. The case of *Ross v. Emer*, 3 *Atk.* 156, is like this; yet no such idea seems to have occurred to Bar or Bench.

But, novel as this view is, it comes from a source too respectable to be neglected. There is no disagreement between us as

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to the principle of construction, that the *intention* should govern. Mr. Leigh contends that, that intention was to deprive the husband of *all* rights whatever in the property, in *every* event; because, the wife having renounced all right to *his* property, it was natural and reasonable that he should renounce all right to *her's*. But was it not still more natural, if he did agree to renounce, that there should have been some direct and express stipulation to that effect? To what sources will he resort for materials for his argument? To vague, undefined and speculative opinions respecting natural justice! Will he look to *property* only as measure of the consideration, and require an equivalent in property to turn the balance? Does he look to the common and general habits of society for his authority? It is not usual for a young man, marrying a wealthy dowager, to renounce all rights in her property. Or does he regard the situation, in which the parties would have been placed had not the Deed been made? This would shew that it was neither natural nor reasonable. But how can the Court estimate the reasonableness of this contract, without inquiry into the extrinsic circumstances; the situation, wishes and objects of the parties! These can not be inquired into. If they could, the question is, what they *have* done, not what others may think it reasonable they should have done.

But "the estate was to be at her sole disposal, *notwithstanding* her coverture." There would be something in this argument, if the *power* of disposal, existing in the wife, divested the husband, whether exercised, or not; to which idea all the authorities are opposed.

"The stipulation on his part, ought to be co-extensive; and "the right of disposal makes her, *quoad* the property, a *feme sole*." There is some confusion of ideas in this proposition. She is a *feme sole* in the exercise of this right, and in acts relating to it; not so as to succession or intestacy; as is proved by the cases of *Ross v. Ever*, *Fettilplace v. Gorges*, *Peacock v. Monk*, and all the authorities.

"There is one event, in which it is stipulated that the husband shall be entitled; and that is an argument that he is "entitled in no other." But how entitled? Not, as he claims, by virtue of the Deed, but by its *destruction*; not when the right of Mrs. Chilton terminates, but by divesting the title ex-

isting in her. Does a stipulation, *avoiding* the Deed, shew what its construction is while existing ?

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What then is this deed ? its character, its object, and the persons, whose rights it was intended to protect ? A Deed excepting, from the general rights of the husband in the wife's property, a power to the wife to dispose of it in a particular way. Its object was to reserve to each a power to dispose of their property, respectively, free from the claim of each ; so that neither could claim of the other against the will of the original proprietor. For this purpose, and this only, was the renunciation of the wife introduced, because, without that, she could claim against his Will. The only parties, whose rights or powers it was intended to protect, are the husband and wife. Beyond the coverture, it looked to the interests of no one, but of those that might be selected by the express Will of the wife, or the express or implied Will of the husband. Who are the parties now claiming under it ? Those, to whom there is not an allusion : they claim, too, by succession, upon the *intestacy* of a *feme-covert* ; a case never heard of. How would the case stand, if the wife had made a Will *with one witness*, giving the property to some one or other of the parties in this suit ?

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Whatever may be the construction of the Deed, the Appellee must recover as *administrator*. In that character he would recover, though he were a third person. If the property should not be wanting for the purposes of administration, and the Appellants be entitled under the Deed, they can recover from him, as they could from another administrator.

The case of *Robinson's adm'r. v. Brock*, quoted as authority for this case, is not apposite, but differs in every essential feature. *That* was a case of the construction of a limitation in the Deed : *here* is no limitation to be construed. *There* it was in the Deed to be construed : *here* we are required to *put it into the Deed* by construction. *There* the question was, whether the popular or technical sense should be given to the limitation : the question *here* is, whether a limitation shall be incorporated in the Deed. *There* you were to interpret what the parties said : *here* you are called upon to supply their silence, and then interpret.

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*Wickham in reply.* The parties to the settlement in this case evidently considered it a fair and equal match : neither of them looked to the property of the other. Common sense shews their intention to have been that each was to retain his and her property. The husband's chance of getting something as his wife's administrator could not have been contemplated by him, as a motive to the marriage. Perfect reciprocity was evidently intended throughout the Deed.

The most important clause is that which declares the Deed to have been made "*to the intent that the property might not be at the disposal of, or subject to the control, debts, forfeitures or engagements of the said John Chilton.*" This applies to *every* period ; not to that of the *coverture only* ; and clearly shewn the intention of the parties to deprive him of all ownership, except the mere use during the *coverture*.

Deeds, to declare uses, are construed with as much liberality as Wills. Judges indeed have lately said that, in all Deeds, the intention of the parties is to be considered. At any rate, such is the rule concerning Deeds of *personal estate* ; and the Deed here is of that character.

No argument in favour of the husband can be derived from the circumstance that the appointment by the wife was to be by Deed or Will in writing. This provision was made to protect her from improper influence on the part of the husband, and also to protect him from unjust accusations.

I consider *Robinson's adm'r. v. Brock* a strong case in our favour. It has a direct bearing on this case. The principle decided is the same in substance with that, for which we contend. It is said that the words, "*her heirs,*" which were in the Deed in that case, are not in this Deed : but there are words equivalent, that the husband shall be excluded. The Judges did not rely on the words "*her heirs.*" but on the husband's being excluded. There was a renunciation of his marital rights. So it is here.

Mr. Stanard says, no *dictum* is to be found in the English Books supporting our construction of this Deed. I answer that no such settlement as the one now in question is to be found in those books. Neither *Ross v. Ewer*, nor *Fettiplace v. Gorges* touch this case. There are many diversities between the legal rules in England, in relation to husband and wife, and those

which prevail in this country. The different habits of the people in the two countries make the difference. The position in *Fettiplace v. Gorges* that the husband succeeds to the wife, not in consequence of his marital rights, but as next of kin, cannot be correct; for he is not next of kin to his wife, except in consequence of his marital rights.

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The express exclusion of the husband is an implied gift to the next of kin. Whether they take *jure representationis*, or by purchase, is unimportant.

It is true that the husband as administrator of his wife has a right to recover the property; but, after the payment of her debts, he is to pay it over to us; and he does not pretend there are any such debts. He has therefore no right in equity to take it from us on the mere possibility of debts.

As to the formal defects in the proceedings; the Court certainly decreed prematurely, without a *Replication* to the answer of one of the joint defendants.

March 11th, 1817. Judge ROANE pronounced the Court's opinion,

The Court is of opinion, that, upon the true construction of the marriage agreement, among the exhibits, the right of *John Chilton*, the husband, to the personal estate of *Felicia Chilton*, his intended wife, embraced by the said agreement, is, by the terms thereof, only restrained, during the coverture, to the use of the said property; and that, after the coverture, in the event, which has happened, of his surviving her, the said *Felicia*, the same was only intended to be farther restrained, if, and in the event that, she should limit and appoint the same, pursuant to the power given by the said Deed.

The Court is farther of opinion, that these provisions are to be considered as exceptions to, and restrictions upon, the general right which he would otherwise have acquired, as an husband, in and to the property aforesaid, and are to be no farther extended, than as aforesaid, under the provisions of the said Deed; and that there are no sufficient expressions therein, importing that his said intended wife should be considered as a *feme sole*, farther than is inferrable from the limitations and powers aforesaid; nor that the husband agreed to renounce all his marital rights to the property in question.

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The Court is farther of opinion, that that clause of the said Deed, which states it to be the intent thereof, that the settled property may not be at the disposal of, or subject to the control, debts, forfeitures or engagements of the husband, is only to be taken in reference to, and as co-extensive with the cases, provided as aforesaid; and not as restraining the power of the husband over the same in all cases whatsoever; a construction which not only fully satisfies the terms of the Deed, but is farther supported by that exception, which immediately follows, in favour of the representatives of the husband, in the event of his wife's claiming an interest in his, her said husband's, estate. As to what is said of a renunciation, on his part, of her estate, being inferable from a correlative renunciation, by her, of his estate; the fact is not so, nor would the inference follow if it were so. She does not renounce a claim on his estate absolutely but only agrees, that, if such a claim should be set up by her, she would forfeit the benefit of the agreement; and if, in fact, her stipulation had been more absolute, there are so many considerations mingling in contracts of this kind, other than those which are merely pecuniary, that a corresponding inference would not arise, unless there were adequate words to import it.

On these grounds, and it not appearing that the deceased wife made any appointment, pursuant to the power given her by the Deed, the Court is of opinion, that the right of the husband is not barred, and that the Decree is not erroneous; an opinion which the Court would pronounce with reluctance, could it look beyond the agreement, and notice that evidence which states, that a stipulation corresponding with the pretensions of the Appellants was intended to have been inserted, by the parties, in the agreement, and was only omitted through hurry or mistake. The evidence on this point, now before us, is, however, irregular and inadmissible, and the Court considers itself, as concluded by the Agreement.

As to the alleged irregularities in bringing this cause to hearing, the Court thinks there is nothing in them. The Answer of *Felicia A. C. Chilton* by her guardian, as well as that of *Thomas Chilton*, that guardian, as a Trustee, is in the record, and is stated to have been filed among the papers: and although the *Clerk* undertakes to say, that they were not no-

...ticed by the Court, we infer the contrary. The caption of the Decree names *these*, among the other defendants to the cause, and the Decree states that the cause was heard upon the Bill, Answers and Exhibits. The Court therefore understands that they were acted upon by the Court below; and the only effect, produced by the omission of a replication thereto, is, that all the facts stated therein are admitted. As to the objection that no day was given to the infant, to shew cause against the Decree after she came of age; it is a sufficient answer, that the Decree is only interlocutory, and that this omission may be corrected hereafter.

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Upon the whole, the Court is of opinion to affirm the Decree.

### Harris against Nicholas.

Decided March  
12th, 1817.

THE Appellee *Wilson C. Nicholas*, by a Covenant under seal agreed with the Appellant as follows: "For the hire of four Negro fellows the present year, *who are to be returned well clothed on or before the 25th of December*, I promise to pay *Frederick Harris* at that time the sum of two hundred and eighty dollars; witness my hand and seal the 6th of January, 1812."

On this Covenant *Harris* brought his action, and for breach alleged, "that one of the said negro fellows, to wit, one named *Joe, alias Roger*, was not returned, well clothed, on or before the 25th day of December next ensuing the date of the said Covenant, nor at any time since; and also that

1. A writing under seal, bearing in these words; "for the hire of four negro fellows the present year, *who are to be returned, well clothed, on or before the 25th of December*, I promise to pay, &c.," *quære*, whether such writing contains a Covenant to return the Negroes, as well as to pay the money?

2. A Covenant, by a person hiring a Slave, to return him at the end of the year, is not to be considered as a Covenant to insure such return in the event of his death in the mean time, although it be occasioned by a cruel and excessive beating, perpetrated by the Overseer, under whose superintendence he is put.

3. The general usage and understanding of the people of this country, in relation to the subject, is an important circumstance to be considered in the construction of a Contract.

4. An Employer or Master is in general not responsible for a wilful and unauthorized trespass, committed by his Agent, Overseer or Servant.

5. *Quære*, whether an Employer, who continues in his service an Overseer, noted for cruelty may not be made liable, by an action upon the case, for the value of a hired Negro, whipped to death by such Overseer, though without any direction from him?

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" the defendant *did not return* the said negro fellow on or before the said 25th of December, nor at any time since."

The defendant pleaded, " that, after the date of the Covenant, and before the 25th day of December next ensuing the said slave *Joe* departed this life;" and for farther plea, that, " after the date of the said Covenant, and before the 25th day of December in the same year, to wit, on the day of 1812, the said slave *Joe*, in the declaration mentioned, without the fault, agency, privity or consent of the defendant, and by an event, over which the said defendant had no control, to wit, by a mortal wound received from a certain *Thomas Thilman*, died, so that the said slave could not be returned to the plaintiff on the said 25th of December, 1812; and this he is ready to verify, wherefore he prays Judgment, &c."

To the first plea, the plaintiff replied, " that after the day of the date of the Covenant, to wit, on at the County of Albemarle, and before the 25th of December 1812, the defendant delivered the negro fellow *Joe*, *alias Roger*, in the Declaration and Plea mentioned, into the possession of a certain *John Patterson*, to labour upon his plantation; on whose plantation the said negro continued to work, with the defendant's knowledge and consent, as one of the labouring hands of the said *John Patterson* until a certain *Thomas Thilman*, on the day of at the County aforesaid, who was then and there acting as the Overseer of the said *John Patterson*, and in his employment, and whilst superintending and managing the labouring hands of the said *John Patterson* engaged upon the Farm in doing his work, and whilst managing and superintending the said slave *Joe alias Roger*, who was then and there, with the knowledge and consent of the defendant, working upon the Farm and doing the business of the said *John Patterson*, under the care and superintendence of the said *Thomas Thilman*, so unlawfully, cruelly, and excessively beat and whipped the said slave *Joe alias Roger*, that, by reason of such unlawful, cruel and excessive beating and whipping the said slave afterwards died at the time in the defendants' plea set forth; and this he is ready to verify," &c. To this replication the defendant demurred generally; and joinder in demurrer.

The plaintiff replied to the second plea, "that the said  
 " *Thomas Thilman* in the said defendant's second plea men-  
 " tioned, and who it is alleged inflicted the said mortal wound  
 " upon the said negro *Joe alias Roger* in the Declaration and  
 " Plea mentioned, was, at the time, when it is alleged in and by  
 " the said Plea that the said mortal wound was inflicted, the  
 " Overseer and Manager of a certain *John Patterson*, to whose  
 " possession and custody the said defendant had delivered the  
 " said negro *Joe alias Roger*, to be used and employed by him  
 " the said *John Patterson* on his, the said *John Patterson's*, es-  
 " tate, and who then and there, with the knowledge and con-  
 " sent of the said defendant, placed the said negro *Joe, alias*  
 " *Roger*, under the management and superintendence of the  
 " said *Thomas Thilman*, as his, the said *John Patterson's* Over-  
 " seer; and, whilst so acting, as Overseer, as aforesaid, he the  
 " said *Thomas Thilman*, so, unlawfully, inhumanly and with-  
 " out any justifiable cause, beat and whipped the said negro  
 " *Joe alias Roger*, that he died; and so the said death was by  
 " the default of the defendant, and therefore is no sufficient  
 " excuse to the said defendant for not performing his said Co-  
 " venant; and this he is ready to verify," &c.

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To this Replication the defendant rejoined, "that the slave  
 " *Joe*, in the said Plea and Replication mentioned, was hired  
 " from the plaintiff by the defendant, for the use and benefit  
 " of the said *John Patterson*, in the Replication mentioned, to  
 " be employed and used by the said *John Patterson* in labour-  
 " ing upon the plantation of him, the said *Patterson*, under  
 " the superintendence, management and sole direction of him  
 " the said *John Patterson*, his lawful Agents and Overseers;  
 " of which fact, the said plaintiff at the time of the hiring afore-  
 " said, had due notice, and to which he fully assented; and that  
 " the said slave *Joe*, afterwards, to wit, on the day of  
 " January in the said year 1812, being so hired, was, with the  
 " consent and knowledge of him, the said plaintiff, and in pur-  
 " suance of the terms, on which he had been hired as afore-  
 " said, delivered by the defendant to the said *John Patterson*  
 " to be employed in labouring on the plantation aforesaid of  
 " the said *Patterson*, over which plantation, and over the  
 " hands labouring thereon, the defendant had no control, and  
 " in which he had no interest; after which said time of deli-



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" very of the said slave to the said *Patterson*, the defendant  
" had no control over the said slave, and no interest in the la-  
" bour or profits thereof: and that the said *Thomas Thilman*  
" in the said Replication mentioned, at the time of the deli-  
" very of said slave to the said *Patterson*, was not the Over-  
" seer or Agent, or otherwise in the employment of the said  
" *Patterson*, but afterwards, to wit, on the            day of  
" in the year aforesaid, before the giving of the mortal wound  
" in the Replication aforesaid mentioned, and without the  
" agency, privity or consent of the defendant, was employed  
" by the said *Patterson*, and placed as Overseer on his planta-  
" tion aforesaid, and entrusted, as Overseer, with the control  
" and management of the said slave as one of the labouring  
" hands on the plantation aforesaid; and this he is ready to  
" verify; wherefore he prays Judgment," &c.

The plaintiff demurred generally to this Rejoinder; and the defendant filed a joinder in demurrer.

The Superior Court of Law sustained the defendant's demurrer to the plaintiff's Replication to the first Plea, and over-ruled the plaintiff's demurrer to the defendant's Rejoinder. Judgment was therefore entered for the defendant, from which the plaintiff, appealed to this Court.

*Green for the Appellant.* I can find no case shewing that a  
(a) *Buller's N. Contract* is merged in a felony; though a *trespass* is. (a) The  
P. 32. felony, committed by *Thilman*, therefore, did not excuse *Nicholas* from the obligation to return the Negro according to his *Covenant*. But, indeed, the question of *felony* did not properly arise in the case; for the killing of the Slave is not charged in the pleadings, as having been done *feloniously*.

*Chapman Johnson for the Appellee.* This is an action of *Covenant* on a Bond for the hire of a Slave, who was to be returned at the end of the year well clothed. The first question is whether, in fact, there is in the Bond any *Covenant* for the return of the slave? Upon inspecting that instrument, we find in it merely a *recital* of the time when the negro was to be returned. It certainly is not an express *Covenant*. There was no necessity of such *Covenant*; for, when the term of service expired, the Law itself raised the obligation

to return. Detinue or trover would then lie for the Slave or his value. The Court therefore will not raise an implied Covenant.

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But if there was a Covenant, it ceased to bind, upon the death of the Slave.

Is *Wilson C. Nicholas* liable for the death of this Slave, in any form of action? The person, who killed, him was not his Agent; and if he were, it was not such an act as the principle was liable for. (a) It does not appear that, when the beating was inflicted, it was in the line of the Overseer's authority. He was not controlling the Slave as an Overseer, but treating him as a Murderer. The beating is stated to have been *severe* and *inhuman*, and the *cause* of his death. If public policy requires the Master to be responsible for the acts of the Overseer, why not make him responsible *criminaliter*, as well as *civiliter*? But public policy is not to make our laws in *this Court*, but *elsewhere*.

(a) 1 Chitty 68;  
East. 106,  
M'Nenus v.  
Crickell.

*Wickham* on the same side. Covenant would not lie in this case, even if the Overseer had acted by his employer's direction. No hirer of a Negro understands himself, as bound to deliver him at *all* events. In this case the Covenant is not, that the Slave shall be returned, but that he shall be *well clothed when* returned.

It is a rule, in the construction of Covenants, that words, forming *one*, cannot be split into *two* distinct and independent Covenants. (b)

If there had been a Covenant, to restore the negro in good health, the Covenantor would have been an Insurer: but this is not such a Covenant. Even if the Negro runs away without the fault of the hirer, he is not bound to deliver him at the time appointed.

(b) 1 Saund. 59.  
Gainsforth v.  
Griffith; and  
the case of  
Broughton v.  
Conway in Dyer  
there cited: al-  
so, Idem 60.

In language of law no *authority* can be given to do an unlawful act. The person, who directs it to be done, is a principal in treason or trespass, and in other cases an accessory before the fact. If an Employer had continued in his service an Overseer, noted for cruelty, I am not prepared to say that he might not have been made liable by a proper form of action. But that question has no application to the present

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case. *Harris* knew that the Negro was to go into the hands of *Patterson*, and *Nicholas* had nothing to do with the choice of the Overseer.

But if *Thilman* had been the Overseer of *Nicholas*, and employed by him, *Nicholas* would not have been responsible; for the act committed was not only out of the limits of an Overseer's authority, but contrary to it; and for such acts of

(a) *Savignac v. a servant*, the master is not liable. (a) The Overseer, whenever he steps out of the limits of his authority, becomes as a stranger. There can be no question, that the act, described in the pleadings, was a felony, though the word "*feloniously*" is not used; for felony may be inferred from facts found in a special verdict; (b) and the facts pleaded bring it within the definition of murder in the first degree, 2 R. C. p. 15.

(b) *Rex v. Oneby*, 2 *Ld. Raym.* 1485.

*Wirt* in reply. There is, I insist, an *express* Covenant to return the negro at the end of the year.

The distinction between express and *implied* Covenants is laid down in 2 *Selwyn's*, N. P. 384; from which it appears

(c) 2 *Sel. N. P.* 391; 1 *Saund.* 319, *Pordage v. Cole*; 1 *Exp. N. P.* 206-7-8. that this is an *express* Covenant; (c) for there is no need of the word *Covenant*, nor of *any particular form of words*, to constitute a Covenant in deed; but *any thing*, under the hand and seal of the parties, *importing an agreement*, is sufficient.

Had the instrument been signed by *Harris*, it would, according to the case of *Pordage v. Cole*, have amounted to a Covenant on his part that *Nicholas* should have the service of the slave during the year. But the words used are the words of *Wilson C. Nicholas*; and, if there were a doubt of their import, must be taken most strongly against him. Unless intended to create a Covenant, the words are useless.

It is said that the Covenant was not *to return* the Slave, but only that, *when returned*, he should be *well clothed*. To this I answer that the *time* of the return is expressly specified: the Slaves were to be returned, well clothed, *on or before the 25th of December ensuing*. This argument, that the Covenant applies to the *cloathing only*, is a legal curiosity. It is that, although the defendant has not delivered the negro at all, there is no breach; but if he had delivered him, not well clothed, there would have been a breach; that is, there could be no breach until he *delivered him not well clothed*.

It is contended that this is a mere *recital*. Of what is it a recital? A recital is always of something extrinsic. But if it were a recital, it is not the less a foundation of Covenant. (a) Mr. Wickham says there cannot be two Covenants in one, or that you cannot make two breaches out of the same Covenant: but a Covenant to pay rent, and leave the premises in repair, is a familiar example of a two-fold Covenant, as to which there might be a breach, of the whole, or of either part. So, here, the Covenant was broken by failing to return the negro at all, or by returning him not well clothed.

That it is a Covenant is admitted by the defendant's pleas, and therefore he is estopped to deny it. If it be a Covenant, and an *express* Covenant, the failure to perform it cannot be excused but by the act of God. (b) His own act, disabling him from performing, is no excuse. (c)

Hiring is one species of *bailment*. If the property be destroyed by the misconduct of the person, to whom it is hired, or of his servant, the master is liable. (d) Overseers and servants are considered, as acting under the master's direction, express or implied, whenever their acts are done within the line of the business, they are employed in. Nicholas by transferring the slave to Patterson made himself responsible for the consequences. Harris, though he knew the Slave was to go into Patterson's service, yet took Nicholas's Bond for the return of the Negro.

In the cases cited on the other side, I believe it will be found, the decisions turned on the form of the action; not on the substantial liability of the master. But our suit is not to make Nicholas answerable for the trespass committed by Thilman, but upon his *express* Covenant.

March 12th, 1817. Judge ROANE pronounced the Court's opinion.

The Court is of opinion that, if the Covenant stated in the Declaration can be considered, as a Covenant to return the Negro in question, as well as to secure the payment of the money due for his hire, it ought not to be considered as a Covenant to *insure* such return in the event, which has happened; especially under the usage and understanding of this country

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(a) *Exp. N. P.*  
258.

(b) *Paradine v. Jane, Alleyne* 27;  
*Beale v. Thompson* 3 Bos. & Pull. 420;  
*Southgate, 10 Mod. 383*;  
*Monk v. Cooper, 1 Str. 762.*  
(c) 1 Bac. 652.  
(d) *Jones on Bailm.* 89.

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in relation to the subject. And the Court is farther of opinion, that the Appellee would not be held liable under the facts disclosed in the pleadings, (admitting that *Thomas Thilman* therein mentioned were his Servant or Agent;) as the act of the said *Thilman*, which caused the death of the said Negro, was neither authorized by the Appellee, nor committed in the usual and proper course of his duty, as such; but was a wilful and unauthorized trespass.

On these grounds, the Court is of opinion to affirm the Judgment.

Decided March  
14th, 1817.

### Hannon and High against Batte.

1. Under the Act of 1812, ch 2. § 18. 19. 20., a Note, negotiable at Bank, may be given in evidence, if duly stamped, before it became payable, though not so stamped when it was executed.

THE Appellee instituted an action of Debt against the Appellants, as endorsers of a Note, made by one *Vial* in September 1815, for \$600, negotiable at the Farmer's Bank of Virginia, and protested for non-payment. Upon the plea of *nil debent* and issue, a Verdict was found for the plaintiff, subject to the Court's opinion upon the following facts: that the Note was executed and endorsed on paper having only a *ten cent stamp*, without any intent on the part of the maker or endorsers to evade the duties imposed by law; and was received by the plaintiff, without his perceiving the mistake as to the stamp; that, shortly afterwards, and before the Note became payable, the plaintiff, discovering the mistake, procured the Note to be stamped with a twenty cent stamp, and apprized the defendants thereof; that the Note has now both the ten and the twenty cent stamps impressed upon it: and it was referred to the Court to decide, 1st. whether it was competent to the defendants to prove these facts in evidence; and 2dly, whether, upon this state of facts, the law be for the plaintiff or defendants.

The Court gave Judgment for the plaintiff; from which the defendants appealed.

*Leigh for the Appellants*, insisted that it was competent for them to give evidence of the facts above mentioned; and that, those facts being found as proved, the Law was for them.

because the proper stamp should have been upon the paper before the Note was executed.

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*May for the Appellee.* The Court has no right to inquire when the Note was stamped. The Judge, at the trial, is to examine the Note, and determine by *inspection* whether it be duly stamped. This is clear, because the fact is never put in issue by the pleadings on either side. The Law upon the subject merely prescribes a rule of evidence, to which the Court will attend.(a)

2. There is nothing in the Act of Assembly, (b) which requires the stamp to be impressed before, or prohibits it after, the making of the Note; both which provisions are expressly made in the English Statutes. Our Act relates only to Notes, which may be collected or discounted at Bank. There is no danger of fraud as to these; because, without the stamp, the Note cannot possibly be either collected or discounted at the Banks; and if it be not intended for the one purpose or the other, a common Note without a stamp is sufficient. The legislature could never have intended, that an accident like this, without any imputation of fraud, should be totally irremediable. The Statutes of Great Britain, and of the United States provide that, in such cases, the Note may be stamped upon paying a penalty, which the Legislature here did not think proper to impose; because the people of Virginia, who pay all their taxes most honourably, and regard any evasion in this respect as base in the extreme, could not be suspected of a disposition to evade this paltry tax; especially that class on whom alone it fell. But this Act is manifestly drawn with very little precision, in the hurry, attendant on the close of a long session, in time of war. The Court will therefore adopt any fair construction of which it is susceptible, to promote justice. It is submitted, then, that the Stamp Master was bound to furnish stamps to any person, who paid the duty; that it was not for him to know whether the paper was executed, or not; and that it is sufficient, if, when the Note is offered at the trial, it "be duly stamped."

(a) *Peake's N. P. Rep.* 173, *Wright & al. v. Riley; Chitty on Bills, (Story's Ed.)* 47.  
(b) *Acts of 1812, ch. 2. § 18. 19.*

3. The special Verdict finds, that the defendants had notice from the plaintiff, that a proper stamp had been subsequently

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impressed; and, for any thing appearing to the Court, they made no objection.

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March 14th, 1817. Judge ROANE reported the Court's opinion, that the Judgment be affirmed.

Decided March  
19th, 1817.

### Baird against Bland and others.

1. When a person, who bought a Slave, with lawful notice of a better title, is decreed to deliver him, and pay profits; *Interest* ought to be charged against him upon the *hires*, actually received by him from other persons, from the dates of his receipts; but not upon the profits of such Slave, while in his own possession without being hired; the same being *unliquidated* and *merely conjectural* sums, and which he was in no default in not paying.

AFTER the affirmance, by this Court, (see 3 *Munf.* 578,) of Chancellor WYTHES's interlocutory Decree, in the suit of *Bland and others v. Baird and others*, by which *Baird* was directed to deliver to the plaintiffs the slave *Will*, first named in the Bill, and account for his profits; the cause being remanded to the Superior Court of Chancery for the Richmond District, an Account was taken, by a Commissioner, of the profits of the slave *Will*, and reported to the Court; to which, the defendant *Baird* excepted, (among other reasons,) "because he was charged hire for *Will* during the life of *Theodorick Bland*," (of whom he purchased,) "during whose life his occupation of the said slave was lawful, and because the Commissioner improperly charged him *interest* on *conjectural* hire and profits of the said slave."

Chancellor TAYLOR was of opinion, "that the defendant *Baird* should only be accountable for the profits of the said negro man *Will*, from the death of the said *Theodorick Bland*, the father of the plaintiffs, as he had an interest in the said slave for his life; and that, if the said defendant is accountable for interest upon the profits of those years, for which the said Slave was *hired out*, (as indicated in a like case by the President of the Supreme Court in *Whitchorn v. Hines*, 1 *Munf.* 508,) why the defendant should not be accountable for interest, in like manner, for those years, in which he kept the possession of the said Slave, is not discerned." He therefore decreed accordingly; from which Decree the defendant *Baird* appealed.

March 19th, 1817, Judge ROANE pronounced the Court's opinion.

The Court is of opinion, that there is no error in the Decree, so far as the principle thereof allows interest upon the hires, of the Slave in question, actually received by the Appellant, from others, from the dates of such receipts respectively : but that the same is erroneous in allowing interest upon hires, not so received by him, and also upon those, decreed to be due by him for the slave aforesaid, the same being *unliquidated*, and *merely conjectural* sums, and which, therefore, the Appellant was in no default in not paying.

The Decree is therefore affirmed, so far as it is not hereby declared to be erroneous, and is reversed as to the residue, with Costs ; and the cause is remanded, to have the account reformed, pursuant to the principles now declared, in order to a final Decree.

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### Manlove against Thrift.

Decided March  
20th, 1817.

IN an action of slander brought by *Robert Manlove* against *William Thrift, sen'r.* the parties, by an order of Court, referred the matter in controversy to *John Pegram* and *Thomas Thweatt*, whose award was to be made the Judgment of the Court. They afterwards signed and sealed a written agreement, purporting that, as *Thomas Thweatt* had refused to act as one of the referees, they requested *Edward Pegram* to serve, in his place, in conjunction with *John Pegram*, and bound themselves, their heirs, &c. to abide by their decision; and also agreed that their award should be entered as the Judgment of the Superior Court of Dinwiddie County in the suit then pending therein between them. *John Pegram* and *Edward Pegram* accordingly made up an award in writing, declaring that they had heard the parties, and their testimony, and awarded that the defendant pay to the plaintiff five hundred dollars. Thereupon came the parties by their attornies, and the plaintiff moved the Court for Judgment on the award aforesaid, but the Court over-ruled the motion, because *Edward Pegram*

1. If, pending a suit, the parties, by an Order of Court, refer the matter in controversy to arbitrators, whose award is to be made the Judgment of the Court; and, afterwards, by an agreement under seal, appoint a substitute for one of them; agreeing that an award, to be made by the remaining referees and such substitute, shall be entered as the Judgment of the Court; such award may be so entered, without any previous Order of Court confirming the appointment of such substitute.

2. A Court's refusal to enter a Judgment according to an award, without determining the controversy, is not a Judgment, from which an Appeal can be taken.



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" was not appointed a referee under an order of the Court; but  
" this *Judgment* was without prejudice to an action founded on  
" the agreement and award." " From which *Judgment* the  
" plaintiff appealed."

*May* for the Appellant.

*Leigh* for the Appellee.

March 20th, 1817, the President pronounced the opinion of this Court.

The Court has no doubt but that the Judgment of the Court below, refusing to enter Judgment pursuant to the award, is erroneous, on the principles settled by this Court in the case of *Shermer v. Beale*, 1 Wash. 11; but the appeal was prematurely allowed, as no final judgment was entered in the case. The Appeal is therefore dismissed with Costs, as having been prematurely granted.

Decided March  
22d, 1817.

### Tennant's Executor against Gray.

1. Where the principal and interest, due on a Bond, amount to more than the penalty, and damages are found by a Verdict, Judgment ought not to be entered for the penalty and costs, to be discharged by the principal and interest, with the damages so assessed and the Costs; but for the penalty and damages, if not exceeding those laid in the Writ.

THIS was an action of debt upon a Bond, dated July 3d, 1789, for 150*l.* 9*s.* 9*d.* to be discharged by the payment of 76*l.* 4*s.* 10½*d.* on demand. The Writ was issued on the 24th day of March, 1806. returnable to the District Court of Frederickburg. The damages stated in the Writ were 20*l.* The declaration was in the usual form, but leaving the damages blank.

On the 17th of October, 1815, a Verdict was found for the plaintiff, for the debt in the declaration mentioned, and 22*l.* 17*s.* 0*d.* in damages. Judgment was entered " for 150*l.* 9*s.* 9*d.* the debt in the declaration mentioned, together with the damages aforesaid in form aforesaid assessed, and Costs; to be discharged by the payment of 76*l.* 4*s.* 10½*d.* with interest

2. But if the damages found by the Jury exceed those in the Writ, a new trial ought to be granted, unless the plaintiff will release the excess of damages; if which be done, Judgment may be entered for the penalty, with the residue of the damages so found, and costs.

\* See *Atwell's Adm'rs. v. Tootles*, 1 Munf. 175.

“ thereon, after the rate of five per centum per annum, to be  
“ computed from the 3d day of July, 1789, 'till paid, and the  
“ Costs and damages aforesaid.”

The defendant obtained a Writ of *Supersedeas* from a Judge of this Court.

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March 22d, 1817, the President pronounced the Court's opinion, that the Judgment was erroneous, in this, that it gave damages exceeding those laid in the *Writ*; and also in this, that, as the principal and interest exceeded the penalty of the Bond, the Judgment ought to have been for the *penalty, and damages, not exceeding those in the Writ.*

Judgment reversed; Verdict set aside; and cause remanded for a new trial, to be had therein, unless the plaintiff would release the excess of damages beyond those laid in the *Writ*; in which event, Judgment was directed to be entered for the debt in the declaration mentioned, and the residue of said damages and costs.

## Mayo against Judah.

Decided March  
24th, 1817.

**JOSEPH MAYO, sen.** presented a Bill to the Chancellor for the Richmond District, stating that, on the 19th day of August, in the year 1813, the complainant purchased of a certain *Manuel Judah*, a lot of ground in the city of Richmond, upon the terms and conditions set forth in a Bond and Deed of Trust, given to secure the payment of the purchase money; by referring to which documents it would be seen, that the principal sum for which the Lot was sold, was not to be paid until the year 1824, but the interest was to be paid on the 1st day of January in every year until that time; that, upon failure to pay the interest on any first day of January aforesaid, and the same being unpaid for three months, the benefit of the credit should be lost, and the Trustees should immediately advertise the Lot

1. A stipulation, in a Bond or Deed of Trust that, upon the debtor's failing at any time, to pay the annual interest, the principal sum (which otherwise would not be payable until a distant day,) shall be considered due, is in the nature of a *penalty*, against which it is the province of a Court of Equity to relieve.

2. In such case, the payment or tender of the interest at any time before the sale under the Deed of Trust, authorizes the debtor to call upon the Court of Chancery to prevent the sale. And, by virtue of the Act of Assembly concerning Executions, passed Nov. 25th, 1814, the debtor was authorized to substitute Bond and security in lieu of payment.

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for sale, in order to discharge the principal sum, with whatever expenses might have accrued on the trust: that the complainant failed to pay the interest on the first day of January, 1815: that by the first section of the Act of Assembly concerning executions, passed the 25th of November, 1814, Execution might be stayed on any Judgment, &c., by tendering to the creditor Bond, with sufficient security, in double the amount of the "*demand*," conditioned in the usual way; and by the 5th section, proceedings on Deeds of Trust might be stayed in the same manner: that as the principal sum was not due until the year 1824, the interest, which was due was the *demand*: under this impression, the complainant had repeatedly tendered to the Trustees, according to the provisions of the Act of Assembly, and was still ready to give, Bond with security in double the amount of the *interest*, but the Trustees had refused to accept it, and were proceeding to sell according to the above recited condition: the complainant presumed that, as the *forfeiture* was occasioned solely by the failure to pay the interest, and as the Act of Assembly declared that the interest need not be paid until January 1816, that Act relieved the forfeiture; and, consequently, the Trustees had no authority to sell: the credit he was to have according to the original contract made the bargain extremely advantageous to him; and, if the forfeiture should be insisted on, and the property sold, he would necessarily be subjected to great loss and inconvenience. He therefore prayed an Injunction, restraining the Trustees from proceeding to sell, and that the contract be re-instated on the original footing, upon his giving Bond with security, in double the amount of the *Interest*, conditioned according to the Act of Assembly.

Chancellor TAYLOR refused the Injunction, being of opinion that this was not a case for a Court of Equity, "for this reason: "that the Trustees must sell, in conformity with their powers "and the Act regulating such sales, if the plaintiff was within "its provisions; and, if they did not, any conveyance, made "by them of the Lot in question, would be unavailing; that "the case was purely a legal one, and Equity should not interfere." But the Injunction was awarded by a Judge of the Court of Appeals, on the terms of giving Bond in double the amount of interest claimed.

On the 19th of January, 1816, the Trustees filed a joint Answer, denying "that any stay bond was ever tendered to them, until after the forfeiture had accrued, as they supposed; "that is, until after the property was advertised for sale the "first time, which was on or about April last." No Answer was filed by Judah.

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The Chancellor dissolved the Injunction; "being *still* of "opinion, that to interfere, in a case like this, would be against "the *legitimate* power of the Court."

From this Decree, an Appeal was allowed by this Court.

*Wirt for the Appellant.* The Chancellor dissolved the Injunction on the same ground, on which he at first refused to grant it.

This case depends on the construction of the Act of 1814, for staying proceedings on Deeds of Trusts, &c. That Act being a *remedial* law, it ought to have a benign interpretation: It was its intention that no forfeiture should be incurred by the debtor's failing to make payment at the time appointed. The Act of 1815, an Act *in pari materia*, allowed the Bond to be given at any time before the sale; and the spirit of that of 1814 appears to require no more.

*Wickham contra.* If the Chancellor pronounced a right Decree, though for a wrong reason, it ought to be affirmed.

The contract in this case afforded an option to the debtor at what time he would pay the principal. It is no penalty, but only the debt itself. The debtor having failed to pay the interest according to the contract, the principal became due. The stay bond ought therefore to have been given for the *principal*; that being then the *debt*. If suit had been brought, Judgment must have been for the principal. The object of the Act was not to change the contract, but only to stay the proceedings to enforce it. Even if the stay bond had been given before the 1st of January, it could not have altered the contract, and would have made no difference as to the present question.

Another point. The Act of Assembly is in opposition to the Constitution of the United States, according to Mr. *Wirt's*

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(a) *New Jersey*  
*v. Wilson* 7  
*Cranch*, 164;  
*Fletcher v. Peck*,  
6 *Cranch*, 89.

construction; for it certainly impairs the obligation of contracts. The stay of proceedings on a Deed of Trust is in direct violation of the contract of the parties. (a) A law interfering with the contract of parties ought not to have a benign, but strict construction.

March 18th, 1817, the Judges delivered their opinions.

Judge COALTER. In this case, the Appellant, having purchased of the Appellee a Lot of ground in the city of Richmond, for the price of \$7000, payable at the expiration of ten years with interest from the date, to be paid annually, and, in default thereof, that the principal sum should, on such default, be due and demandable, as appears by the Bond, executed at the time, he also executed a Deed of Trust, on the Lot so purchased, to secure the payment. This Deed recites that it is to secure the payment of \$7000, a debt due to the Appellee, on the 1st day of January, 1824; with legal interest from the 1st day of January, 1814: and, in declaring the trust, and the objects of it, it has reference to the Bond aforesaid, and provides, that, if the Appellant shall fail to pay the legal interest on the 1st day of January, 1815, and so on for each succeeding year, or should he fail on the last mentioned day to pay the principal sum, then, or in the event that the interest for any one year shall be three months due and unsatisfied, the Trustees may proceed to sell the Lot; first, to discharge all expenses, &c.; "secondly, to discharge the Interest and Debt of \$7000, which shall be understood to have become due, whenever the interest, before enumerated and spoken of, shall have been three months due and unsatisfied, or any part thereof shall be so due and unsatisfied."

The interest due on the 1st day of January, 1815, being in arrear and unpaid by the space of three months, the Trustees were about to sell the Lot, when the Appellant tendered a Bond for the payment of the interest, under the Act of Assembly "concerning Executions and for other purposes," passed November 25th, 1814, for the purpose of stopping the sale. The Trustees having refused to stay proceedings, application was made to the Chancellor for an Injunction, which, being refused by him, was granted by a Judge of this Court, and finally dissolved; from which Decree this appeal is taken.

The Act of Assembly provides, that defendants shall have power to stay Execution upon any Judgment or Decree, &c., by tendering Bond and sufficient security, in double the amount of the *principal and interest*, payable to the plaintiff or plaintiffs, &c. at the repeal or expiration of the Act; and that proceedings shall be suspended upon every Decree for the sale of real property, and also all proceedings by any Trustee on any Deed of Trust in the same manner, as a Judgment may be stayed, &c.

Bond being tendered, in this case, for the amount of the first year's interest due and in arrear, *only*, the first and great question is, whether that sum, agreeably to the contract, was the amount of the creditor's *demand*? Whether that was the *principal sum then due*, which, with interest thereon, was to be secured according to the provisions of the Act?

This question, according to my view of the case, will be much simplified by considering what judgment a Court of Law would have given on the Bond above referred to.

If the provision, that, on failure to make punctual payment of the interest, the principal sum shall then fall due and be payable, is to be considered as a new *penalty*, in addition to the \$14 000 penalty in the Bond, in order to enforce payment of the interest annually, then the annual interest would be considered in the nature of instalments, and the Judgment would be entered for the penalty, to be discharged by the instalment, agreeably to *Bridges v. Williamson*, Stra. 814, and *Master v. Touchet*, 2 Wm. Bl. Rep. 706. This latter was debt on a Bond, conditioned to pay 600*l.* and interest, in three years from the date of the Bond, by instalments of 15*l.* half yearly, and 615*l.* at the end of the Term: proceedings were stayed on payment of the interest due, I presume under the Stat. 4 and 5, Ann. ch. 16, § 13, which is so far similar to our Act, that it permits 'the defendant to *bring the money really due into Court*, whereas our Act directs *judgment to be entered for the sum due*.

The case cited is the one before the Court, with this difference, that, in the case cited, there is no stipulation that, on failure to pay the instalment, (which, in that case, as in this, was no more than the interest,) the principal sum should be considered as due.

But why this additional penalty, if the parties so considered it, when, without it, the \$14,000 would have been forfeited on

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failure to pay the interest? or was it intended to reduce the penalty, in that case, to \$7000? and on which penalty ought the party to bring suit? I cannot believe that the parties viewed it in the nature of a penalty. Here was a debt, *debitum in presenti, solvendum in futuro*, or *in presenti*, at the election of the debtor, upon his compliance, or not, with a condition, by which he could extend the time of payment. He pays no more money, but pays it sooner, or later, at his election. It is no injury to him to pay it promptly, if he is able to do so; and whether he is, or is not, is within his own knowledge; and, at all events, there is nothing in the circumstance of *prompt payment*, by which the interest is stopped, (which interest is, in law, considered equivalent to the use of the money,) which can swell this into a penalty.

This case is not to my mind distinguishable, in principle, from those of *Goulet v. Hanforth*, and *Bonafous v. Rybot*: the first to be found in 2 *Wm. Bl.* 958, where the defendant was bound in a Bond conditioned to pay 496*l.* by instalments, and, if default were made in the payment of any one or more, then the Bond to stand in force for the whole principal and interest; on default, suit was brought on the Bond: the defendant's motion, to stay proceedings on payment of the instalments due, with costs, was over-ruled. The Court said, this was *not* to relieve against a *forfeiture*: the plaintiff had agreed to give time to the defendant, provided he would punctually pay by instalments; by neglecting so to do, he has lost the benefit of his *condition*, and remains in the case of other debtors on Bond. The second will be found in 3 *Burr.* 1370, where Lord MANSFIELD, in distinguishing a like case from those, where *greater interest* has been reserved, in default of paying a less rate, and which he says would be a *penalty*, says it is *more* like the case of a *less interest* being agreed to be received, *if punctually paid*; and, says he, "it is a *condition* unperformed, therefore the party "cannot have relief in a Court of Equity, any more than in a "Court of Law.

The Bill itself, in this case, states that the credit, which the Appellant was to have according to the contract, made the bargain *extremely* advantageous to him. So a party might say, that the payment of a less rate of interest would be extremely advantageous to him, and therefore it was a penalty on him,

when he was unable to pay punctually, to make him pay the greater sum; but Law and Equity both say, that, able or not, he must comply with the condition, or forfeit the benefit.

There is nothing hard, oppressive or unfair, alleged as to this part of the contract: it is not alleged in the Bill, (if such circumstances could have weight,) as it has been in argument, that an enhanced and speculating price was given; but rather the reverse, as would seem from the above quotation; nor is it even alleged that the party, from the pressure of the times, was unable to pay the interest; so as to give the Court of Equity any head of jurisdiction, which would not equally have availed at law in a suit on the Bond; nor is it stated that this was intended as a penalty; on the contrary, the statement in the Bill is, that *the condition of the Bond, and the terms of the Deed of Trust were, that, if the interest was not punctually paid, the benefit of the credit should be lost*: in short, the Bill puts it merely on the ground, that the interest alone was the demand, which the Appellant had a right to secure under the Act, so as to avail himself of its provisions. Had any of the other grounds been taken, they might have been denied and disproved. Taking this case up, then, on the Bond and Deed of Trust, and supposing the Act of Assembly had never been passed; it may be considered, if the doctrine contended for is law, that, if a man has money to lend at legal interest, for the support of himself and family, he cannot provide for calling in his principal, if that support is not punctually paid him, because it will operate as a penalty on the borrower, however pointedly he may agree to borrow the money on those terms. If this is a penalty in Equity, it is equally so, I apprehend, at Law, and Judgment would be entered up accordingly. It does not appear to me that the place or manner of introducing this stipulation into the Bond, or Deed, can vary the nature of the contract, which, not only by those instruments, but according to the Bill itself, was an agreement to sell property and give a distant day for payment, provided the purchaser would pay the interest punctually; without which stipulation, the seller, it is to be presumed, would not have given the day. I can see nothing unfair, unreasonable, or more like a penalty, in this, than in a case of money, lent as above supposed; and I can, therefore, neither

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on the score of authority, nor reason, give my sanction to the doctrine contended for.

But, if a penalty could be supposed, I should incline to consider it, at most, in the nature of a stipulated, or agreed compensation, to be made in default of punctuality. Courts of Equity, though, will not interfere, as far as I am at present advised, to relieve against such penalties, unless there is something

(a) *Fenbl. St.*  
1st, ch. 3, § 2,  
note (d); 2 *Atk.*  
180. *Roy v. the*  
*Duke of Beau-*  
*fort*: 4 *Burr.*  
2223, *Lowe v.*  
*Peers.*

unfair, or very unreasonable in the transaction. (a) But what more reasonable compensation can be given for the price of money, where that price is withheld, than the money itself? It is the very thing, neither more nor less, which the law gives; money being worth its interest, and *vice versa*.

If I am right, then, in my conclusion that, independent of the Act of Assembly above referred to, the Appellant, on failure to *pay the interest*, would have been compelled to *pay both principal and interest*; and that neither a Court of Law, nor Equity would have relieved him therefrom; the second question, if it may be called one, is, whether that Act alters the case? If the preceding part of my opinion is law, it will be admitted, I presume, that, if the Appellee had sued on the Bond, the Appellant could not have pleaded a tender of a Bond, for the *Interest*, on the 1st of January, in discharge of the action, so as to make such Bond tantamount to a *payment* of the Interest on the day, and so a compliance with the condition. If such plea would have been over-ruled on demurrer, and the Court would have given Judgment, (for want of a sufficient plea,) for the penalty, to be discharged by the \$7000, with Interest and Costs; then, to avail himself of the Act, the Appellant must have tendered Bond and Security for this sum: and, I presume, after such Judgment, no Court of Equity, resting on the Act of Assembly alone, would have enjoined that Judgment, on the Appellant's allegation that he had tendered Bond and Security for the Interest; a fact, which he could have shewn was admitted by the Demurrer in the action at Law. If the Court could not interfere in the case supposed, neither, I apprehend, could they, to stop the Trustees, unless Security for the \$7000, and Interest, had been tendered; and this, independent of the consideration, that, according to the Deed of Trust, as it appears to me, there is no remedy under it, to sell for the *Interest* annually; which

is a farther proof of the full understanding of the parties, that, in default of payment of interest, the payment of the principal was to be enforced. The Act, I apprehend, did not intend to stop or change the operation of contracts, but to stop, to a certain extent, the operation of the Courts of Justice in carrying into effect their Judgments and Decrees, and to place proceedings, under Deeds of Trust, in the same situation as Judgments or Decrees in Chancery for the sale of property.

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How far the Act, as to this subject, *staying proceedings under Deeds of Trust*, was an unconstitutional interference with, or change of the contract of the parties, was touched upon by the Appellee's Counsel; but was afterwards, as I understood, waived by him, and is not intended to be considered or decided on by the present Court, consisting of but three members, unless it shall again be brought before them, when it must stand over for a fuller Court. According to my view, however, be that question as it may, the party is not entitled to the benefit of the Act, having tendered Security only for the amount of the Interest due. For these reasons, and not those assigned by the Chancellor, I am for affirming his Decree.

Judge CABELL. As Lord MANSFIELD said in the case of *Bonafous v. Rybot, Burr. 1370*, there is a distinction in Courts of Equity, "that, if five per cent. be reserved for interest on a Mortgage, with a condition to accept four, if punctually paid; this condition must be strictly performed: and the Debtor shall not have relief in equity after the day of payment elapsed; because the one per cent. was to be abated upon a condition, which is not performed. But if four per cent. be reserved, with an agreement that, if the four per cent. be not punctually paid at the day, the Mortgagee shall pay five, *that* shall be considered as a penalty added: and the Court of Equity will in such case relieve against it."

These principles are well elucidated in the case just cited from *Burrow*. There, "the Bond was conditioned for the payment of a gross sum then due, to be paid at a certain fixed day. There was a subsequent agreement, made in favor of the Debtor, easing him of that stipulated single payment at that fixed day, and allowing him to pay it by

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"more distant instalments; provided that he pay it punctually on the day agreed upon: otherwise the agreement and defeazance to be void." The Debtor did not pay the instalments punctually, and the Court determined that therefore the agreement and defeazance were void, and that the gross sum was due to the Obligee. That case was within the former part of the distinction above referred to; "for it was a condition unperformed;" and consequently the Debtor could not be relieved even in a Court of Equity.

The case of *Gowlet Ex'or. of Gladwell v. Hansforth*, (2 Sir Wm. Black. Reports p. 958) was decided on the same principles. The facts of that case are not so fully stated, as those of the case in *Burrow*, although the decision turned on the special condition of the Bond; but it is evident, from the reasons assigned by the Court in its decision, that the facts were substantially the same; and more especially, that the stipulation, to pay by instalments, was introduced for the benefit of the Debtor, by enabling him to discharge by more remote instalments, a gross sum which, but for that stipulation, would, according to the original contract of the parties, have been sooner due and demandable. For the Court expressly says that, "the plaintiff had agreed to give time to the defendant, and to forbear prosecuting his just demand, provided the defendant would punctually discharge it by instalments. By neglecting to do so, he has lost the benefit of his condition, and remains in the case of other Debtors on Bonds."

These were cases, where relief was refused to the Debtor; but the principles, on which it was refused there, shew that it ought to be granted in the case, now to be decided.

In all cases of this kind, it is necessary to ascertain the true intention of the parties, and to distinguish carefully between the original contract itself, and any subsequent stipulation, which purports to effect a qualification or modification of that contract; between what the parties originally intended to be done, and what they may agree to substitute therefor, on certain events. Thus, in the cases cited above, from *Burrow* and *Sir Wm. Blackstone*, the original contract was to pay a gross sum by a certain fixed day; the subsequent stipulation was for discharging that sum by distant and easy instalments. In the case of an ordinary Bond, the original contract is to

pay a certain sum by a given day; the stipulation engrafted on it is, that, in case of failure to pay at that day, the Debtor is to pay double the sum. It is all important to ascertain the character of these stipulations. If they were introduced for the *benefit of the Debtor*, (as in the cases above cited) by extending to him a more easy mode of payment, he will be permitted to avail himself of them, provided he comply with the terms; *because it is competent to the Creditor to abate a portion of his own just rights*. But if the object of the stipulation be to ensure to the Creditor a punctual compliance with the original contract, by imposing upon the Debtor farther and greater obligation in case of failure, it is considered as a penalty which is always relieved against; for Equity is satisfied with the execution of contracts according to their true and original intent.

Let these principles be applied to the present case. Both the Bond and the Deed of Trust shew that the Contract was for the sale of a Lot at the price of \$7000, payable on the 1st of January, 1824, with Interest from the 1st of January, 1814; the Interest to be paid annually on the first day of January in each year. This was the *real Contract* between the parties, to which a stipulation was superadded, that if the Interest be not paid, the whole principal was to become due and recoverable. The distinction is most obvious between this case and those cited. There the stipulation was for the benefit of the Debtor; here for the benefit of the Creditor. This stipulation, if it be allowed to operate at all, effectually changes the contract of the parties, by subjecting the Debtor to the immediate payment of a sum, which, by the original contract, was not to be paid 'till the year 1824, and is as much a penalty, as the obligation to pay double the amount of the Debt, in case the Debt itself be not punctually paid. Upon general principles of equity, therefore, I think *Mayo* should be relieved against the forfeiture, which has occurred, and that no sale shall take place but for the interest, which has occurred.

*Mayo's* title to relief from the forfeiture, being thus independent of the Act of Assembly, it is unnecessary to enter into the constitutional question, raised in the argument. I did not, however, understand the Counsel for the Appellee, as contend-

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ing, that the Act of Assembly is unconstitutional, so far as it operates merely to postpone the payment of a Debt under the circumstances, and in the manner, contemplated by the Act. And the Act is not relied upon, in this case, farther, than as it postpones the payment of the Interest, which Interest, in my opinion, constituted the whole of the *demand*, that Equity will tolerate.

I am therefore for reversing the Chancellor's Decree, and re-instating the injunction.

The following was the opinion of the Court, pronounced by Judge ROANE :

The Court is of opinion, that the stipulation, both in the bond and deed of trust exhibited with the Bill, whereby it is provided that, if the said *Mayo* should fail to pay the annual interest, the principal sum of seven thousand dollars should be considered as due, is in the nature of a *penalty*, against which it is the province of a Court of Equity to relieve; that the amount, which the creditor was entitled to demand of his debtor in this case, was the interest, due on the first day of January, 1815; that the payment or tender of this sum by the debtor, at any time before the sale under the Deed of Trust, authorized the debtor to call upon the Court of Chancery, to prevent such sale; and that, by virtue of the Act of Assembly, "concerning Executions, and for other purposes," passed on the 25th day of November, 1814, the debtor was authorized to substitute bond and security for the *interest*, in lieu of the money; (which sum so secured would have borne interest;) a tender of which bond and security is admitted by the answers of the Trustees to have been made.

For these reasons, the Order of the Chancellor, dissolving the complainant's Injunction, is reversed, and the Injunction is reinstated: and the Court, proceeding to make such order in the cause, as should have been made in the Court below, doth adjudge and order, that the Injunction, so far as it seeks to inhibit the sale of the property for the payment of the principal sum of seven thousand dollars, by reason of the non-payment of the interest, due on the first day of January, 1815, be perpetuated. And the Court doth farther adjudge, order and decree, that, if the creditor *Judah* shall make the

endorsement on the said Deed of Trust required by the Act in such case made and provided, (1) then the Injunction shall be open to a motion for dissolution, and an order of sale for the said sum, due for interest as aforesaid, with interest thereupon; but, on the payment of such last mentioned sum, by the said *Mayo*, at any time before the sale, after deducting therefrom the Costs in this Court, and the Supreme Court of Chancery, that then the said Injunction be wholly perpetuated.

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(1) Note. See the Acts of 1816, ch. 40. § 1. p. 70.

## Williams against Price.

Decided March  
29th, 1817.

UPON an Appeal from a Decree of the Superior Court of Chancery, holden at Staunton, in a suit brought against the  
1. The 12th section of the Act of Congress, passed September 24th, 1789, entitled, "An Act to establish the Judicial Courts of the United States," does not extend to cases, in which citizens are joint defendants with aliens, or with citizens of other States, and have also essential interests in the cause, which may be affected by a removal into the Federal Court.

2. *Quære*, whether that section extends to any case, in which citizens are joint defendants with aliens, or with citizens of other States?

3. *Quære*, whether the provisions of that section be authorized by the Constitution of the United States?

4. A stipulation that the property purchased shall be the only security for payment of the purchase money, in exoneration of the person and other property of the purchaser, is not repugnant, but valid and obligatory on the parties.

5. In such case, the land is to be considered as a *pledge*, liable to raise by sale the money due, or so much thereof, as it may be adequate to produce; the surplus, if any, to enure to the benefit of the debtor.

6. In the event of such debtor's inability to comply with his contract, he may relinquish his eventual interest in such surplus, and give up the land in absolute property to his creditor; thereby exonerating himself from the debt. And, if the conveyance of the land to the debtor has not been completed, it is unnecessary, in the event of such surrender, to go on and perfect the same; but, instead thereof, the contract for such conveyance should be annulled.

7. A party is not bound by any admission of his, in an offer, tending to a *compromise*, which was not accepted.

8. Personal, and even transitory and fluctuating property may be made the subject of a *lien*, at the pleasure of the contracting parties; but, generally, *explicit words* should be used to effect that purpose, where such *lien* is not raised by operation of law or equity.

9. It seems just, however, that the property purchased should be considered liable for the purchase money; especially, in a case in which a personal exemption of the purchaser has been stipulated; and where the parties themselves, by their subsequent *acts*, appear to have expounded the contract in that sense.

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Appellant Cumberland D. Williams and others, by James Price.

The Bill stated that, in the year 1803, a certain *Englishman Yeiser* of Baltimore, having purchased very valuable and extensive real property in Augusta County, Virginia, at the price of \$16,000, a contract was entered into between said *Yeiser*, a certain *Joseph Williams*, and the complainant, whereby said *Yeiser* sold to each of them one fourth of said real property; and it was agreed that the parties to the said agreement, which was dated the 6th of August, 1803, should erect and conduct in partnership, on said real property, a furnace for iron works, on the terms specified in said agreement: that the parties accordingly engaged in the enterprise of said iron works; the plaintiff expended large sums in erecting the Furnace, now called Mount Torry Furnace, on said property, in making other improvements thereon, and preparations therefor: that *Joseph Williams* sold his one fourth of the property to *C. D. Williams*, of Baltimore; and that the business was carried on, under this new firm, under the agreement aforesaid, until the 9th of January, 1806, when a new agreement to regulate the conducting of the iron works was entered into; under which last, the business was carried on until the plaintiff parted with his interest therein: that the plaintiff and *C. D. Williams* became jointly interested in certain other property in Augusta County, on which is *Belvedere Forge*, which they conducted in partnership until the 29th of November, 1806, when the plaintiff sold his moiety to said *Williams*: the Furnace was carried on by the partnership last mentioned, until the 13th of March, 1807, when the plaintiff sold his one fourth thereof to *C. D. Williams*.

10. If personal property, consisting of perishable articles, provisions, raw materials for manufacture, implements necessary for a furnace, &c. be pledged, together with the furnace and land, for payment of the purchase money; the lien is not to be construed so strictly as to tie up the property from use; nor that even the same kind and amount of property shall be forthcoming in future; without a stipulation to that effect: but the purchaser is bound to make good only such waste thereof, as shall have arisen from his *fraud, wilful default or misconduct*, and to give up what remains on hand when he surrenders the property in satisfaction of the debt.

11. Where a purchaser, having his election to restore certain articles of personal property, makes an offer to do so, which the vendor refuses to accept, the purchaser is not thereafter responsible for any waste or damage the property may sustain without his wilful misconduct.

12. Under what circumstances, a purchaser, having his election to restore the property, is not disabled, in equity, from availing himself of such right, by his having made a *loss* thereof,

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The Bill then stated the substance of the agreement of March 13th, 1807. *C. D. Williams* bought of *Price* his one fourth of the Furnace and its appurtenances, and all the servants, stock, horses, waggons, coal, iron and other things belonging to said Furnace, or to Belvedere Forge; and all debts due to the Furnace or Forge, and the benefit of all contracts with either of them. *C. D. W.* stipulated to pay to *James Price* \$23,000, out of which were to be deducted certain debts to be assumed and paid by the former for the latter: the balance of the \$23,000 to be paid by instalments; *C. D. W.* to pay the plaintiff's proportion of the debts due from the Furnace and Forge. The plaintiff agreed that *Yeiser's* representatives (he being dead) should convey the Furnace property to Trustees, to be by them re-conveyed to *C. D. W.* who should then convey it in trust to secure the performance of the agreement on his part. It was farther stipulated, that the "*property so to be conveyed to C. D. W. as aforesaid, should be the only security for his performance of said agreement; it being expressly agreed and understood by and between the parties, that neither the said C. D. W., his Heirs, Executors, Administrators, estate or effects should, at any time thereafter, be answerable, or in any manner liable for the payments aforesaid, or for the performance of any Covenant or Agreement therein, farther than the said property, so as aforesaid to be conveyed to him, would extend to discharge and satisfy the same.*"

The Bill farther stated that, in pursuance of this agreement, *C. D. Williams* entered into the immediate possession and enjoyment of all the property, real and personal, sold to him by the plaintiff; that he proceeded to pay off part of the debts from the Forge and Furnace Concerns, and to collect a part of the debts due to them; that he paid \$1015,06 due at the Office of Discount and Deposit in Baltimore, and also \$250 part of a debt to one *Clements*, which the plaintiff, by the contract of November, 1806, had bound himself to pay, but had left unpaid: he, however, did not (as the agreement required) assume the payment of a note in the Bank at Baltimore, for \$3669,13, nor give his own note to the plaintiff for the amount thereof; but for a long time evaded, and ultimately refused doing either: that, on the 30th of July, 1808, he executed a lease to *Joseph Williams* of



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the whole of Belvedere Forge, and of all the said *C. D. W.*'s interest in Mount Torry Furnace, to commence from the first of May, 1808, and to expire on the first of July, 1811, with a right reserved to *C. D. W.* to terminate the lease at any time, on giving four months previous notice; the rent reserved being \$2650 per annum, not distinguishing between the rent for the forge, and the rent for the furnace; by which lease, all the pig metal, bar iron and castings on hand, at the commencement thereof, and all the debts due, either to the forge or furnace, were conveyed to *Joseph Williams* absolutely, who was to use the stock on hand during the term, and, at the end thereof, *return it in kind or value*; covenanting to pay the debts, due from the forge and furnace, in iron, and *to return the rented furnace in good repair*: that, on the 17th of December, 1808, while the said lease was in full force, and *Joseph Williams* in possession, (no notice having been given him of an intention to revoke it,) *C. D. Williams*, in Baltimore, wrote a letter to the plaintiff, declaring himself unable to comply with the articles of agreement of March, 1807, and saying he was compelled to avail himself of the last provision in those articles, and to give up to the plaintiff his quarter of the furnace, and all the property belonging thereto, which remained on hand, of what he had received of him; saying nothing about the time or manner of returning said property, nor about the lease to *Joseph Williams*; but saying that a part of the debts yet remained unpaid, for the payment whereof *Joseph Williams* was to deliver iron; thus seeming to admit that *C. D. W.* was yet bound to pay the debts, and that *Joseph Williams's* lease was to continue. The Bill protested against any construction of the agreement, by which *C. D. W.* should be permitted to surrender the property in discharge of personal or other responsibility; alleging that the personal property at the Furnace was greatly diminished by his fault or neglect; that he had left the State, and the United States; that, prior to his departure, viz. on the 24th of April, 1809, he conveyed the forge, and *one fourth of the furnace*, to his brothers, in trust, to secure to them \$50,000; and that the said Lease and Deed of Trust were both *fraudulent*. The plaintiff alleged, that the accounts between himself and *Yeiser's* estate had never been settled; and that a balance was due to him; and that no bill

*had been made by Yeiser, or his representatives, to the plaintiff for his one fourth of the furnace property.*

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The prayer of the Bill was for an Account; that *Yeiser's* heirs be decreed to convey and perfect the title; that the nature of the lease and Deed of Trust be investigated; that the property in the hands of *Joseph Williams* be attached; "that the real property sold, by the plaintiff to *C. D. Williams*, by the agreement of March 13th, 1807, and so much of the personal property as remained," be sold to pay the balance due to the plaintiff; and, in case of a deficiency, that a personal decree be entered against the said *C. D. Williams*.

The answer of *Cumberland D. Williams*, filed in July, 1810, went into a very minute and particular statement of facts and accounts, not necessary to be detailed here. It admitted the existence of all the contracts stated in the Bill: it denied that the lease to *Joseph Williams*, or the Deed of Trust to the respondent's brothers, was fraudulent, averring that both were *bona fide* transactions, and that the Deed was executed to reimburse advances made, and to meet such, as his brothers were continuing to make for him: it described each of those instruments, as embracing all the forge property, and the whole of his interest in the furnace. In relation to the relief sought by the Bill, the respondent seems to have taken three grounds of defence: 1st. That the plaintiff, not have procured a conveyance from the representatives of *Yeiser*, had no right to call upon *C. D. Williams* for the performance of any covenant on his part; the procurement of such conveyance being considered as a condition precedent to the performance of any act on the part of *C. D. W.*: 2d. That the plaintiff had no right to recover any balance, that may have been due him from the furnace partnership, or from *Yeiser*, one of the partners, on the 13th of March, 1807; for two reasons; the one, that, by the agreement of that date, such balance was plainly transferred to the respondent; and the other, that the plaintiff, by his agent, had relinquished this claim to *Yeiser's* representatives: 3d. That the last clause in that agreement, protected the respondent, in his person and property, from any liability, and authorized him to return to the plaintiff, in full discharge of all obligation, his one fourth of the real property appertaining to the furnace, and so much of the personal property, as might be remaining.

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In support of this last ground, the respondent denied the correctness of the schedules exhibited with the Bill; and alleged, that, living as he did at a distance from the property, and having only visited it once, he was ignorant, at the time of making the contracts with the plaintiff, of its value and incumbrances, and was induced to make those contracts by the false representations of his friend and relation *Joseph Williams*; that, nevertheless, he was fearful of the consequences of embarking farther, because of the unprofitableness of the works theretofore, and had the last clause introduced, after great deliberation, for the express purpose of protecting himself from losses; which clause was well weighed, and well understood, both by himself and the plaintiff's agent: that the plaintiff received decided and numerous advantages from the contract entered into with the defendant: on the other hand, the defendant never derived any advantage from the plaintiff's one fourth of said furnace property: that \$1000 were never realized from the debts due to said forge and furnace; that most of those debts were for advances made to workmen, who were insolvent, and had absconded: several thousand dollars of this description had been entered, "*desperate*," on the books of the works: that whatever had been derived from this source, had been applied to the payment of the debts, due from the concern, and in keeping up the establishment: that, owing to the bad quality of pig iron on hand, for some time before the defendant's purchase, the character of the works was materially injured; that the value of the personal property belonging to said works was very inconsiderable: that, finding the works deeply in debt, and in bad credit, the bar iron out of repair, the pig iron of a quality unfit for use, the forge standing still waiting for better metal, it was impossible for the respondent to comply with the agreement: he had expended \$48,130,05, and had never received one cent of profit: that the respondent's means being thus wholly exhausted, he meant to put an end to carrying on the business; but, *Joseph Williams* being of opinion that he could manage the works to advantage, the respondent agreed to lease his interest in them to said *Joseph Williams*, he expressly stipulating to pay off the debts, and there being a provision that the defendant might at any time revoke the lease on four month's notice; which clause was

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inserted because the defendant did not know what disposition he might be compelled to make of the property : that *Joseph Williams*, in pursuance of said stipulation, had extinguished the largest of said debts : the respondent had received no part of the rent reserved ; but *Joseph Williams* was responsible therefor : that the respondent's concern in the said iron works having been so disastrous, no alternative was left to him, consistent with honour and justice, but a candid disclosure to the plaintiff, of his inability to accomplish a specific compliance with his agreement ; and, being desirous to do him more than justice, by returning him his property in no manner deteriorated, but, on the contrary, greatly enhanced in value, by being relieved of heavy incumbrances of debts, which the plaintiff would have been bound to pay, and by improvements erected thereon by the respondent, he wrote to the plaintiff the letter of December 7th, 1808.

*Benjamin Williams, Samuel Williams, Amos A. Williams and George Williams*, by their joint answer, referred to exhibits, as shewing the amount of their advances for *C. D. Williams*, and alleged that the Deed of Trust to secure these advances, and such as they might thereafter make, was executed in good faith.

The answer of *Joseph Williams* admitted that *Yeiser* and himself entered into the agreement, in 1803, with the plaintiff ; that it was true that, afterwards, to wit, in November, 1804, this defendant, with the assent of two partners, sold his interest to *C. D. Williams* ; from which time, until 1808, he had no connexion with the business, except as agent for *C. D. W.* : this connexion as agent enabled him to say that the schedules referred to in the Bill were grossly incorrect, including nearly double as much property, as was delivered to *C. D. W.* under the contract of March 13th, 1807. This defendant admitted he leased *C. D. W.*'s interest in said property ; that said lease was *bona fide* : that *Yeiser* did, in 1806, convey to him his part of said furnace ; which conveyance, though absolute on its face, was intended to be in trust for the benefit of *Yeiser's* children : that he is willing, as one of *Yeiser's* representatives, to comply with any decree of the Court for completing the plaintiff's title : that he supposes, if any balance was due from *Yeiser* to the plaintiff, it was transferred, by the agreement of

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March, 1807, to *C. D. W.*: that he holds the property leased according to the terms and principles of that lease, and on a secret trust for *C. D. W.*, or his Trustees.

The answer of *Yeiser's* Executors. They had heard and believed there was a partnership in iron works between *James Price*, *Joseph Williams* and said *Yeiser*, and that *C. D. Williams* also became interested in said works; but they had no knowledge of the state of the accounts relating thereto. They alleged, however, and were ready to prove, that said *Yeiser* sold all his interest in said iron works (being the moiety thereof) to *Joseph Williams*, upon condition of his paying all the money, due from said *Yeiser* to the other partners, or to other persons, on account of said iron works, or partnership therein; as would fully appear by a deed from said *Williams* to *John Borland* and others, in trust for these purposes, recorded in Augusta County Court: that *C. D. Williams* had also released the estate of said *Yeiser* from all claims, which he as co-partner may have had against *Yeiser*; but the defendants do not know how the accounts stand. They deny that the plaintiff has a *lien* on the real estate, while the other partners are personally liable.

General replications were put in to all the answers, except that of *Yeiser's* Executors.

The depositions taken on both sides, related either to the construction of the written agreement of March 13th, 1807, which was attempted to be explained by *parol* evidence, or to the state of the works, when *C. D. Williams* received them in 1807, and when he offered to return them under the contract; also to the manner in which the works were conducted. It was contended, on the one hand, that the value of the property was greatly *enhanced* by *C. D. Williams's* management, and by the improvements he put thereon; whilst it was attempted to be shewn on the other, that the property was *deteriorated*, and *Price's* security diminished, by *C. D. Williams's* conduct.

An Order of Account was made on the plaintiff's motion: whereupon a Commissioner returned a Report, which being re-committed, he made another; to which the defendant *C. D. Williams*, and the plaintiff, both filed exceptions: but, as no decision was had upon them in the Court of Chancery, or in this Court, it is unnecessary to insert them.

A motion was made to the Chancellor, in behalf of *C. D. Williams*, who, at the time of the institution of this suit, was a citizen of the State of Maryland, to remove the cause to the Circuit Court of the United States, under the 12th section of the Act of Congress, entitled, "An Act to establish the Judicial Courts of the United States," passed September 24th, 1789; but the motion was over-ruled.

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On the 4th of April 1812, Chancellor Brown delivered the following Opinion and Decree.

Before I proceed to an opinion on the merits of this case, it may be proper to notice some objections, which have been made to the reception of certain exhibits, as evidence in the cause. The first I shall mention is the deposition of *Joseph Williams*, objected to on the ground of *competency* as well, as *credibility*.

This objection I consider well founded. The Witness is a defendant, and his interest may be deeply affected by the ultimate decision, which may be given in this cause. Besides other grounds of interest, he is the real owner (notwithstanding he seems, by his answer, to think otherwise,) of all *Yeiser's* interest in the Furnace property, including half the lands belonging thereto, and is responsible for the payment of *Yeiser's* partnership debts, to secure which he has executed a Deed of Trust, (of the same date with *Yeiser's* Deed to him,) of this property to *Borland* and others; in which Deed *Yeiser* is also a party.

The next objection is to the reception of *parol* testimony, viz. that of *F. Price* and others, to explain the agreement of the 13th of March 1807. This I consider also a good objection. There is nothing in this agreement to take it out of the general rule, respecting the admission of said testimony to explain a Deed. So far, therefore, as those Witnesses are introduced for that purpose, I think their testimony inadmissible.

There are some other objections, to certain depositions, for want of notice, and for irregularity; on which it is necessary only to observe, at present, (as I have endorsed my ideas on the papers themselves,) that, whenever the objecting parties have attended, and cross-examined the Witness, I have con-

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sidered all defects, as well for want of notice as formality, waived.

This cause involves two important inquiries. 1st. What is the plaintiff entitled to recover from the defendants, or either of them?

2dly. What is the *extent* of his remedy against the defendant *C. D. Williams*? In other words, is the defendant *personally* liable for the payment of any sums in which he may be found indebted?

First, What is the plaintiff entitled to recover, or can he recover any thing from *Yeiser's* representatives?

His claim against them is for a balance due from Union Forge to Mount Torry Furnace; and for extra advances on behalf of said Furnace. It is contended that those claims are the private and exclusive property of the plaintiff, unconnected with his partnership character, to which he is entitled in the same manner, that he would have been for money lent or advanced to *Yeiser*, as an individual, upon his *individual* credit; that if *Yeiser's* estate should prove insolvent, the whole loss would devolve on the Complainant; and therefore that he has not parted with his interest in them by the agreement of the 13th of March 1807, transferring his partnership rights. But the debt due from Union Forge was a debt, due to the Furnace partnership, and not a debt, contracted with the plaintiff in his private or individual character. If it should be lost in consequence of *Yeiser's* insolvency, the loss must be jointly borne by the plaintiff and the defendant *C. D. Williams*, the other partners in the Furnace Firm, as the plaintiff's extra advances were made on the credit, and for the benefit of that firm. And those several transactions having never been closed 'till after the 13th of March 1807; nor any separate contract made with *Yeiser* respecting them; the defendant, on that day, had a claim against the partnership for them, in the same manner that he would, under the agreement of that day, have a right, in case of *Yeiser's* insolvency, to require the defendant *C. D. Williams* to pay his the plaintiff's increased proportion of the debts occasioned by such insolvency. It therefore appears to me, on the best consideration I have been able to give the subject, that the plaintiff's interest in those claims was a partnership interest, which was transferred by the fol-

lowing clause of the agreement of the 13th of March 1807, viz. "Also all the right, interest and benefit of him the said James Price, as well in and to all the debts, sums of money due, owing or payable to all or any of the said several partners in the said several Iron Works," &c. &c.

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The correctness of this construction of the agreement has been contested by the supposition, that the claim against Yeiser might have exceeded the whole price, which was to be given for the property. But how would this argument apply to the supposition that the debts, which the defendant C. D. Williams had assumed to pay, might have exceeded the whole value of the property purchased? The presumption is that the partners had some knowledge of the state of their affairs; and, should a fact happen, as has been supposed, on either side, the Court might fairly presume some fraud or mistake in the transaction, which might be proved and relieved against."

It will here be understood, that the Court offers, at present, no opinion as to the real amount of Yeiser's debt, or the right of the defendant C. D. Williams to recover it from the heirs of Yeiser. This, it is believed, cannot be properly ascertained in the present suit.

Secondly, what is the plaintiff entitled to recover of the defendant C. D. Williams? On this point, I am equally satisfied that the plaintiff has a just claim against this defendant, for the full amount of the purchase money, agreed to be given by the aforesaid Contract of March 1807, with interest from the respective periods of payment, after deducting therefrom the sum of \$1015,06 cents paid at the Bank of Discount and Deposit, and the farther sum of \$250 paid Clements. This last credit, as it has been much controverted, requires some remarks. By the agreement of November 1806, the plaintiff undertakes to pay, first, the interest or discount, for one year, on a Note in Bank; 2dly, the second payment of \$500, to Clements; and 3dly, half the Debts of the Forge; making three distinct Covenants. In the agreement of March 1807, this former agreement is specially referred to, and it is there stipulated that the defendant C. D. Williams "shall and will pay, satisfy and discharge all and singular the debts and engagements, due, owing or payable from the said James Price and C. D. Williams, as late partners in the aforesaid



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"Forge; and, generally, all claims against the said Forge; so  
"that the said *James Price* shall be exonerated and discharged  
"from a Covenant contained in a certain Agreement hereto-  
"fore, on or about the 29th of November last past, &c. &c.  
"for the payment of one half of the said Debts." Here we  
see the extent, to which the agreement of November 1806,  
was to be set aside by the new contract; viz. the payment of  
half the Forge Debts. These \$500, were once a partnership  
debt, being for the purchase of the Forge Seat, &c. But the  
partners had, before this last agreement, provided for its pay-  
ment in a certain way; and this provision is not set aside  
by this agreement more than the Covenant for the payment of  
the interest or discount.

My reason, for charging the defendant *C. D. Williams* for  
the payment of the full amount of the purchase money and in-  
terest, according to this agreement of March 1807, is simply  
that he has contracted to do so; and I know of no rule, by  
which one contracting party, where the contract is fair, and  
has been deliberately entered into, (which appears to have  
been the case here,) can avoid that contract without the con-  
sent of the other. If he has paid debts, he was bound to do  
so. If he has made improvements, they must be considered  
for his own benefit. The property was absolutely his own.

I come now to the last, and to me not least difficult point:  
that is, is the defendant *C. D. Williams* personally liable for  
the payment of this money?

This leads me to an examination of the agreement; the  
last clause of which is drawn with a particular view to this  
question, and is so cautiously worded, as scarcely to admit of  
doubt, as to the intention of the parties.

I am not prepared to say that such a clause as this in an  
agreement renders the whole contract void, or would *itself* be  
a void Covenant; or that B. might not purchase an estate  
from C., with the liberty of restoring it, in a reasonable time,  
in discharge of the purchase money. And this certainly  
would be the effect of this Covenant, in the latitude contend-  
ed for; for if the estate is the only security, and there is no  
personal responsibility, why not give it up to the Vendor, to  
dispose of as he pleases, without the expence and delay of a  
suit; since this would be all that could be obtained by a suit?

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But, in that case, there would be a special trust and confidence that the property should not, in the mean time, be deteriorated: there would be a moral obligation on the Vendee, which would create an implied assumption, on his part, to return it at least as good as he received it, and perfectly disencumbered, to the Vendor. It would be entirely different from any case where there was a personal responsibility; in which, such special trust and confidence need not be supposed. Without, therefore, expressing any *positive* opinion on the legal effect of this clause, provided no change of circumstances in the property sold had taken place; and taking the defendant's exposition as the correct one; let me ask, ought the plaintiff *now* to be tied down to this security? It is in vain to talk of its improved state, upon the evidence before us. The testimony of *Joseph Williams* is inadmissible; and *Cahil's* goes, principally, to improvements at the Forge, with which we have nothing to do. But the whole mass of testimony goes to shew that it is *now* destitute of every thing requisite and necessary to carry on the operations: and the unavoidable destruction and waste, which time produces, must convince every one of its deteriorated state. If debts have been paid, the defendant *C. D. Williams* was bound by contract to pay them: and it has been before observed, that he has no right to abandon his contract without the plaintiff's consent. But what was the situation of this property on the 17th of December 1808, when the defendant *C. D. Williams* offered to deliver it up? And had he it then in his power to restore it? This offer was made from Baltimore, two hundred miles from the plaintiff or the property, and four months after he had given a lease upon it, for upwards of two years after the offer was made; not for the plaintiff's benefit, as has been alleged, but for his own; and to a tenant, whom he must have known the plaintiff would not have accepted of, because it was known to him that the plaintiff had sold out, in part, to avoid any connexion with him. It is said in the Answer, that this lease embraced no part of the real property sold by the plaintiff; and the defendant claims the benefit of all the personal property conveyed by that sale. But the lease, which is dated 30th July, 1808, some months before the offer of surrender, is all the defendant *C. D. Williams's* interest in the

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Furnace; and at that time he held the plaintiff's half part. But it is said, the plaintiff's title being superior, he could have evicted the tenant; and if not before the termination of his lease, he would have been entitled to the Rent. But for the payment of that Rent there was no security; and its amount is, as appears by the papers in this cause, disputed by the parties to the lease.

Under this view of the case, could the defendant avail himself of this offer to return the property? (a doctrine once contended for, though not by his Counsel here.) And how ought it to operate in discharge of his personal responsibility? I mean not to reflect on the character of the defendant *C. D. Williams*. From my knowledge of him, I would suppose him incapable of doing, intentionally, a dishonest or dishonourable act. But, finding himself unable to comply with his contract, which I have no doubt was entered into with good faith, and deceived by the flattering prospects, held out to him by the other defendant, *Joseph Williams*, he consented to lease the property to him in July. In the December following, finding his expectations again disappointed, he made the offer of the property. It was then beyond his control; and, surely, it was not right to confide to one, who might utterly destroy without the possibility of making compensation, and who, it appears, has considerably injured that property, which he contends is the plaintiff's only security for the payment of the whole purchase money, not only of that, but other property. Whatever his rights might once have been under his contract, I think him *now personally* responsible, for the balance of the purchase money, beyond what that property will pay.

It has been said that the plaintiff has no right to recover any thing, as the defendant has received no Title. A complete Title, before all the heirs of *Yeiser* come of age, could not have been expected. But the Court will not compel the defendant to pay 'till his title is perfectly secured. This is agreeable to the universal practice.

As the defendant, *C. D. Williams*, cannot have complete justice without a cross bill, he will be permitted to file one, and to make the heirs of *Yeiser* parties, if he thinks proper,

to try the validity of the release mentioned in his Answer, and also to ascertain more correctly the amount of *Yeiser's* debt.

The Mortgage to the defendants, brothers of *C. D. Williams*, embraces no part of the real estate sold by the plaintiff to the defendant; and I very much doubt whether the last clause in the agreement embraces the personal property. This would be a reason, with me, for construing the agreement, as the plaintiff contends; that the Debts in Bank were to be immediately paid or assumed, according to the understanding of the parties at the time of contracting; and, that the Debts at Bank have not been paid, is an additional reason, why I consider the defendant personally responsible; as the personal property seems wholly disposed of, or wasted.

For these reasons, I am of opinion, that the plaintiff is not entitled to any balance for extra advances to the partnership, which may have been due to him on the 13th of March 1807, the date of the last contract between him and the defendant *C. D. Williams*; but that any such balance, whatever it may have been, was transferred to the said *C. D. Williams* by the contract aforesaid; that, under all the circumstances of this case, the said *C. D. Williams* cannot be entitled to return to the plaintiff, the Furnace property, the subject of the Contract aforesaid, or such of it, as is remaining, in its injured and ruinous condition, or to restrict the plaintiff's security for the purchase money to that property alone; but that the plaintiff is entitled to recover from the defendant the amount of said purchase money, subject to the following credits; viz. \$1015,06 cents, paid by the defendant at the office of Discount and Deposit in Baltimore, and the farther sum of \$250, paid to *Clements*; that the Mortgage to *Samuel Williams* and others, brothers of *C. D. Williams*, does not cover that part of the real property, appertaining to the Furnace, which was the subject of the contract between the plaintiff and the defendant *C. D. Williams*; and that is doubtful even, whether it covers that part of the personal property: but they were properly brought before the Court, if upon no other ground than this, that the profits of the real estate, which were conveyed to them, might, after the payment of their debt, be attached for the satisfaction of the plaintiff's debt; and that the plaintiff, who appears, by an Exhibit in this cause, to have procur-

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ed a Deed, to *Frederick Price* and *William M'Mechen*, from the widow of *Englehard Yeiser*, and from *Joseph Williams* and *Elizabeth* his wife, *Richard Sex Kingsmore* and *Rebecca* his wife, and *Catharine M. Yeiser*, but which has not been duly proved as to all the parties, or recorded in proper time as to any of them, ought, before he demands payment of the balance of the purchase money aforesaid, to procure a sufficient Deed of Conveyance, to himself, for the legal title to the said one fourth of the Furnace real property from the said widow of *Englehard Yeiser*, and as many of his heirs, as may be capable in law of conveying, and a sufficient deed of release, from the said *Frederick Price* and *William M'Mechen*, of all their right and title therein, and then execute to the said *C. D. Williams* a sufficient Deed, with general warranty, for the same, and moreover file in the Office of this Court, a Bond, with sufficient security, in the penalty of twenty thousand dollars, payable to said *C. D. Williams*, and conditioned for the complete indemnification of the said *C. D. Williams*, his heirs and assigns, against the claim or claims of such of the heirs of said *Yeiser*, as shall not have conveyed as aforesaid. Under this view of the case, it is unnecessary to express any further opinion on the various exceptions filed to the Commissioner's Reports.

IT IS THEREFORE ADJUDGED, ORDERED AND DECREED, that, upon the plaintiff's procuring the Conveyances from the widow and adult heirs of *Englehard Yeiser*, and the release from *Frederick Price* and *William M'Mechen*, executing the Deed with general warranty to the defendant *C. D. Williams*, and filing Bond with sufficient security, in the Clerk's office of this Court, in the manner specified in the foregoing opinion; then the said *C. D. Williams* do pay to the plaintiff the sum of \$21734,94 cents, with six per cent. interest on \$3669,13 cents, part thereof from the 13th day of March, 1807; (that being the amount of the note at Bank, which said *C. D. Williams* was bound to take up at the date of the contract;) on one fourth of the residue thereof from the first day of January, 1809, 'till paid; on one other fourth from the first day of January, 1810, 'till paid; and on the balance from the first day of January, 1811, 'till paid, together with the costs, which the plaintiff has expended in prosecuting the suit. And if the said *C. D. Williams* shall not have paid the aforesaid sum of money, with in-

terest as aforesaid, within 120 days after the plaintiff shall have complied with the precedent conditions hereby required of him, then , who are hereby appointed Commissioners for that purpose, any two or more of whom may act, are hereby authorized and required, after having advertised the time and place of sale for six weeks, in some newspaper, published in the town of Staunton, and at the door of the Court house of Augusta County, on one Court-day at least, to sell at public auction, for cash, the one undivided fourth part of the real property sold by the plaintiff to the defendant *C. D. Williams*, by the contract of the 13th of March, 1807, aforesaid; to wit, one undivided fourth part of the Mount Torry Furnace, and the lands thereto appertaining; and, out of the proceeds of said sale, that they do pay first the costs and charges thereof, then, to the plaintiff, the money, with interest and costs hereby decreed to him, if sufficient there be for that purpose; and the balance, if any, that they do pay over to the defendant *C. D. Williams*, or his order.

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It is farther adjudged, ordered and decreed, that the Bill of the plaintiff be dismissed as to the defendants *Samuel Williams*, *Benjamin Williams*, *Amos A. Williams* and *George Williams*; but without costs. As to the representatives of *Englehard Yeiser*, this cause is continued for farther proceedings; and, on the motion of the defendant *C. D. Williams*, by his counsel, leave is given him to file a cross Bill against *Joseph Williams* and the said representatives of *Yeiser*."

The counsel of the defendant, *C. D. Williams*, objected to the foregoing Decree, and contended that, if the Court subjected his client to personal responsibility at all, they should direct the furnace property to be first sold, and the said *C. D. Williams* should then be responsible for the residue; in order that the said *C. D. Williams*, who had no objection to the sale of said property, might only appeal from so much of the Decree as subjected him to personal responsibility, and thereby not encounter the risk of damages on the whole amount of the Decree. The Court not having thought proper to reform its Decree according to this principle, he appealed from so much of the said Decree, as directed him to pay to the plaintiff the money and interest therein mentioned.

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The plaintiff also appealed from so much of the same Decree, as disallowed his claim for extra advances.

The cause was argued here, (in the absence of the Reporter,) on the 4th and 5th of February, 1817, by *Nicholas and Wickham* for *C. D. Williams*, and *Chapman Johnson and Wirt* for *Price*, on a preliminary question, whether the motion made in the Court below, to remove the suit to the Federal Court, ought to have prevailed, or not.

Upon this point, Judge ROANE delivered the following opinion of this Court.

"The Court is of opinion, that, upon the true construction of the 12th section of the Judicial Act of the United States, the motion made in this case to remove the cause, from the Court of Chancery, into the Circuit Court of the United States, was properly over-ruled. That section, if it extends at all to cases, in which citizens are joint defendants with aliens or citizens of other States, does not embrace cases, like the present, in which citizen defendants have, also, essential interests in the cause, which may be affected by a removal into the Federal Court. The Court adopts this opinion upon the construction of that Act, merely; and without reference to the question whether, in this particular, it be constitutional or not. This course is pursued by the Court on account of its thinness at this time. It has no hesitation, however, in saying, that it does not consider that the case of *Brown v. Cripps & Wise*, 4 H. & M. 173, decided that question. The question of constitutionality was not made in that case; and the decision turned, exclusively, upon the construction of the Act. That question is to be considered, therefore, as still open; except so far as it may be affected by the principles settled by the Court in the case of *Hunter v. Fairfax*, 4 Munf. 1—59; as to which, for the reason before assigned, the Court at present gives no opinion.

The cause was farther argued on the 17th, 18th, 19th, 20th, 21st and 22d of March, 1817, by *Nicholas, Call and Wickham*, for *Williams*, and *Johnson and Wirt* for the Executrix of *Price*, who had departed this life.

The Counsel for *Williams* relied on the following points:

1st. That the Court ought not to have decreed a sale before a complete title to the property was made.

2d. That by the agreement of March 13th, 1807, *Williams* was exonerated from all personal responsibility, and the Court erred in decreeing against him personally.

3d. That there was nothing in the evidence filed, nor in the reports of the Commissioner, which justified the Court of Chancery in departing from the stipulation that the property should be the only security; but both shewed the propriety of adhering to it.

4th. That the plaintiff, not being able to comply with his contract, and a Decree to account having been entered, and reports returned, by which it would appear that *C. D. Williams* had disbursed large sums of money in paying debts, charged on the plaintiff's one fourth, a Decree ought to be entered for the payment of the monies so advanced by the defendant.

5th. That, even on the principles contended for by the plaintiff, the *land* was the primary fund for the satisfaction of his claim; and no personal Decree ought to have been entered against the Appellant, until that was disposed of, and then only for the deficiency, that should appear.

6th. That there could have been no *lien* intended on the personal property, which was constantly changing.

*For Price's Executrix*, it was contended, that the Decree was wrong in disallowing his claim for extra-advances; because that claim was for a debt due to him from *Yeiser's* representatives; and, by the contract of March 1807, his interest was conveyed, in such debts only, as were due to the respective firms, not his interest in a debt due to himself, from a member of the firm, or from the firm itself: but that the Decree was right in other respects.

In support of this last position, the Counsel insisted,

1st, That the plaintiff's failure to convey the legal title presented no objection to the relief he sought: because such conveyance was not a *condition precedent*: because it appeared, on the face of the contract, that the legal title was in *Yeiser's* heirs, some of whom were infants: and because the want of legal title, and the non-age of *Yeiser's* heirs, made it necessary to come into a Court of Equity for relief:

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2d, That *C. D. Williams* was not exempt from personal liability, under the contract of March, 1807; because it became a personal contract, and the only remedy given by it being a personal remedy, no stipulation in the contract could exempt him from personal liability; and because it was not the intention of the contract so to exempt him.

3d, That, by the contract, *C. D. Williams* was bound forthwith to provide for the debts in Bank, and pay *Price's* proportion of the partnership debts, for which no security was deemed necessary; and the property was to be security for all other payments.

4th, That, whether the clause respecting security is to be restricted, or is to be construed, as extending to all the payments, yet *C. D. Williams* was bound to the careful preservation and management of all the property purchased by him, and to a faithful application of that property and its profits to the payment of the monies due from him.

5th, That under either construction of the contract, payments voluntarily made by him did not diminish the fund for security, but left the whole amount standing, as security for balances unpaid.

6th, That if the plaintiff's security was to be restricted to the property sold, then the personal property and the profits of the real, must be ascertained by an account, and injury to the real property by an issue of *quantum damnificatus*: but that it was not to be so restricted; because of the inadequacy of such inquiries to do justice to the parties; because *C. D. Williams* did not apply the property, as he was bound to do, did not carefully preserve or manage it, and had it not, with its profits, ready to be applied to the payment of the monies due from him.

7th, That *C. D. Williams*, by the *Deed of Trust* for the benefit of his brothers, and the *Lease* to *Joseph Williams*, had disabled himself from restoring the property to the plaintiff; and that, on this subject, a temporary inability was equivalent to an

(a) 5 *Viner.*  
221, 223, 224,  
pls 1, 2, 3, 4, 8,  
11, 12, 13. *Sir*  
*Anthony Main's*  
*case*, 5 *Co.* 21.

eternal one. (a) In reply to this last point, it was said that *C. D. Williams* was not bound to restore the property. He had even a right to sell it; and the buyer would have taken it subject to *Price's* lien. There it was; let *Price* take it. If *Williams* was incapacitated from delivering it, did that incapacitate *Price* from claiming

pen  
What? Is equity to go beyond the law, and for the purpose of en-  
forcing a forfeiture?

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de  
Judge CABELL. On the 13th of March, 1807, *James Price*  
and *C. D. Williams* entered into articles of agreement, by  
which *Price* agreed to sell and convey to *C. D. Williams* an  
undivided fourth part of Mount Torry Furnace, in the County  
of Augusta, (in which the parties had long been partners,) to-  
gether with one fourth part of the lands and premises apper-  
taining thereto, and of all the tools, utensils and implements  
used therewith or thereon; and also of all the horses, oxen,  
teams, waggons, carriages, gears, wood, coal, unwrought or  
wrought iron, indented servants and stock of every nature, and  
all and every other matter and thing appertaining either to the  
aforesaid Furnace, or to a certain Forge in the said County of  
Augusta, and lately held in copartnership by and between the  
said parties, and also all the right, interest and benefit of him  
the said *Price*, in and to all debts or sums of money owing to  
or payable to all or any of the several partners in the said iron  
works; as all contracts, agreements and engagements made,  
contracted or entered into, by and between the said several  
partnerships or either of them, and any other person or per-  
sons, whereby the said several partnership concerns or either  
of them, can or may be benefitted.

In consideration of the foregoing covenants on the part of  
*Price*, *C. D. Williams* bound himself to pay the sum of \$23,000  
in the manner set forth in the said articles of agreement; to  
pay and discharge all the debts due from the said *Price* and *Wil-*  
*liams*, as late partners in the Forge aforesaid, and to pay *Price's*  
proportion of all debts due from the Furnace partnership.  
There then follows an article, which provides that *Price* shall  
cause a title to one fourth of the Furnace lands and premises  
to be made to *Williams*, who was thereupon to convey the  
same, in trust, for the purpose of securing the payment afore-  
said, and generally, the true performance of the agreement on  
the part of *Williams*: and the articles of agreement conclude  
with the following stipulation: "that the said property, so as  
"aforesaid to be conveyed to the said *C. D. Williams*, shall be  
"the only security for the payments aforesaid, and performance  
"of this agreement on his part; it being hereby expressly

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"agreed and understood by and between the parties to these presents that neither the said *C. D. Williams*, his heirs, executors, administrators, estate or effects shall, at any time hereafter, be answerable, or in any manner liable for the payment aforesaid, for the performance of any covenant or agreement in these presents contained, farther than the said property, so as aforesaid to be conveyed to him, will extend to discharge and satisfy the same."

The principal questions, made in this case, arise on the construction of the clause last recited.

Written contracts would be worse than useless, if the parties, after having said in writing, that they mean one thing, should be permitted to prove by witnesses, that they mean another. The parol testimony in this case, in relation to the intention, is, therefore, utterly inadmissible. And even if it were permitted to adduce such testimony to *explain, in a doubtful case*, the intention of the parties, it would be unnecessary in the present instance. For, if language has power to exhibit the intention so palpably, as to exclude all possible doubt, that power has been effectually exercised in the case before us. *Williams* agreed to purchase the property, and to pay a stipulated price for it. But it was not the intention of either party that he should be liable in his person or estate, for that stipulated price. Both parties intended that the property to be conveyed should be the only security for the money agreed to be paid for it; that the property to be conveyed, and not *Williams*, should be liable for the purchase money. I cannot doubt that it was competent to *Williams* to insist on such a stipulation, and now to avail himself of the benefit of it. The prudence of the stipulation is proved by the result. I have no doubt that the clause, which thus substitutes a lien on the property, in lieu of personal responsibility, extends to the personal as well as real fund; not merely because it is just that it should be so, but because I think it is expressly provided for. The terms "the said property so as aforesaid to be conveyed to the said *C. D. Williams*," have reference to the preceding part of the covenant, which describes the property to be conveyed, and thus embrace the whole property both real and personal, in possession and in action, as fully as if the same had been again particularly repeated.

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I concur in the opinion that the property, thus subjected to the lien, is to be regarded as a pledge. Such of it as was in possession, passed, at once, by consent of both parties, into the hands of *Williams*, who also had the power of collecting the *choses in action*, for which purpose, he might, if necessary, have used the name of *Price*. *Williams*, then, is to be considered as a pledge holder for a debt due from himself, and for which he had stipulated that there should be no other security, but the pledged fund. As such, I consider that he had a right to surrender the pledged fund to his creditor; and if he had surrendered the whole, he would have been totally exonerated, both as a pledge holder and as a debtor. If he would neither surrender the pledged fund, nor pay the purchase money, a Court of Chancery would subject that fund, or so much thereof as might be necessary, to the payment of the purchase money. But suppose, (as is alleged in the case before us) only a part of the pledged fund was offered to be surrendered; and that the residue has been wasted, used or disposed of by *Williams*, so that a Court of Chancery can no longer act directly upon it. Is *Williams* to be discharged of all obligation in relation to that residue? or will he be permitted, (in the language ascribed to him by one of the witnesses) "to do no more than it may please him to do?" I am clearly of opinion that he is not thus discharged. Although the clause in the Covenant so often referred to, will exonerate him from paying, as a *purchaser*, the *price stipulated* to be given for the property, he will, nevertheless, be accountable, as a *pledge holder* for the *real value* of the property so wasted, used or disposed of, except, so far as it may have been applied to the objects of the pledge. He has covenanted that the property, which he received, shall be *Price's* security, and his only security. Shall he be permitted to impair that security by fraud, negligence, misconduct, waste or an application of it to his own uses, and not be compelled to make compensation? I understand it to be admitted, that if he waste the fund, or if loss happen to it through his wilful default or misconduct, he will be personally responsible therefor. If he has used, or disposed of the fund to his own use, so that it has not been applied, or is not now ready to be applied to the object of the pledge, viz. the payment of the purchase money,

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I consider him equally responsible. But a difference is sought to be made in this case, because it is said that the parties intended that the property should be *used*. I admit that was the intention of the parties; and farther, that they must have expected that much of the property, from its very nature, would be consumed by that use; and, in this last respect, it differs from an ordinary pledge. This however, only justifies that, which would, otherwise, be an illegal violation of trust. But, although it gives him the right to use the property, it does not exempt him from the obligation of accounting for the value of that, which has been used, and not applied as aforesaid. Nor is the case varied by the property having been used or consumed in the operations of the furnace; for that was for *Williams's* and not *Price's* benefit. These, in my opinion, are the results, not only of the general principles of law and equity, but of the particular provisions of the last clause in the covenant, so much relied on by *Williams*; for its language is that he is not to be personally liable for the payments aforesaid, "farther than the said property, so as aforesaid to be conveyed to him, will extend to discharge and satisfy the same." Had it not been for this stipulation, he would have been personally liable for the whole of the *agreed price*. As it is, he is exempted from all personal responsibility *beyond the value* of the property; of course, he remains liable *to the extent* of that value. However, as he held it only as a pledge, he will be discharged for so much, as he may have forthcoming, or may have applied to the objects of the pledge.

This distinction, between *Williams's* liability as a *purchaser*, and his liability as a *pledge holder*, is not a distinction without a difference. The last clause in the covenant destroyed the former, but established and perpetuated the latter. The former extended to the whole *price* stipulated, although it might have been a thousand times greater, than the worth of the property; the latter is restricted to the property itself, or to its *real value* only.

The result of these principles is, that *Williams* had a right to surrender the whole or any part of the pledged fund. If he surrenders or offers to surrender a part only of the fund, he is nevertheless liable for any waste, or injury, done to the part, thus surrendered, or offered to be surrendered, by his gross

misconduct, or wilful default; and he is accountable for the balance not thus surrendered, or offered, including such debts as may have been lost by his negligence. But, against these charges, he should have credit for all payments, he may have made towards the purchase money, (including *Price's* proportion of the debts, he may have paid) and also such losses, as may have happened to the fund by the act of God.

I concur in the opinion, that the time, when *Price* received *Williams's* letter of December, 1808, is the proper period, when the offer to surrender was made, and should have been accepted; and I am farther of opinion that *Williams* is not liable for subsequent waste or dilapidation; this exemption, however, is not to extend to any portion of the fund, which may have been since applied to his own use. I consider *Price* to be entitled to the debt due from the *Yeisers*, and to his portion of all the debts due at the time of the offer to surrender, but liable to *Williams* for any advances, which *Williams* may have since made on his account. I concur in the opinion that there is no longer a necessity for selling the pledged fund, but that *Price* is reinstated in all his rights of property therein.

I am therefore of opinion that the Decree be reversed; and the cause remanded, to be finally proceeded in according to these principles.

Judge ROANE. For the general grounds of my opinion in this case, I beg leave to refer to the opinion and decree to be delivered by the President. That decree has been drafted in a spirit of concession, so far as it relates to me, as to minor points, and with a view to procure as much unanimity, as is practicable in the ultimate decision of this cause.

While we are all unanimous as to many of the principles involved in this case, I regret that the worthy Judge, who has last spoken differs from the rest of the Court on one point which cannot be deemed unimportant. While he admits in the fullest terms, that the Appellant was exempted from personal responsibility, for the purchase money, by the terms of the contract of March 13th, 1807, he has adopted a construction, which, in effect, amounts to the same thing; by holding the Appellant liable, (if I understand him correctly,) for all the personal and perishable property, annexed to the forge and

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furnace, under all possible circumstances. It undoubtedly amounts to the same thing, if, (of which there is no doubt,) that property, in addition to the real subject, is adequate to cover the debt in question. To this point, I shall apply the few remarks I have to offer, and rely, for the other parts of the case, (or such of them as are deemed proper to be noticed,) on the Decree, to be pronounced as aforesaid.

I think the Court has conceded enough, (possibly more than enough,) in admitting that the personal subject is at all embraced by the *lien*, and that, for all unjustifiable *dilapidations* thereupon, he shall be held *personally* liable. More than this I cannot concede: and I am not absolutely sure that even this is not going too far. It is not upon the terms of the *contract* that I have consented to go thus far: but upon the general justice of holding the subject purchased liable for the payment of the purchase money, and upon the understanding, which seems to have prevailed, on the part of the Appellant, that the personal subject was also comprehended. That understanding, however, has never been manifested, (but quite the contrary) to the extent, to which this construction would carry it: that is, to make the Appellant liable for the return of the personal property, under all possible circumstances: he has never admitted himself liable for *any* dilapidations, or to restore *more* of that property, than should be on hand at the time of the offer to return it. On the ground of the Appellant's assent and understanding, therefore, this is the *ultimatum* that should bind him; and as the other ground of general *justice*, just mentioned, may be limited or extended by the express contract of the parties, it may well be doubted whether the criterion established by the Court does not rather give the Appellee too much, than too little, in relation to the *personal* subject.

The contract of March 13th, 1807, is substantially divisible into two parts: 1st. That which conveys the purchased property from the Appellee to the Appellant; and 2dly, That which *re-conveys* it, as it were, or a part of it, in the shape of a pledge. As to the first part of this contract, it is *specific*; and goes into detail, as to both the real and personal subject. After conveying the land and furnace, it conveys *specifically*, and by a minute description, all the personal property, to which it relates. This, in the opinion of the contracting parties, was

necessary to convey that property; and it would seem to be equally necessary in the *re-conveyance* thereof, if it had been intended to embrace the personal subject. That minuteness, however, is not absolutely necessary, and would be readily dispensed with, if, in the last part, there were even *general* words of reference to the first part, or clear and unambiguous expressions competent to reach it. As to the conveying part of this contract, the case would be made complete, by shewing what articles were on the premises at the date of the contract, and the Appellant could thenceforth take possession of them: but as to the re-conveying part, there is both a defect of any clear expressions to shew that *any* personal goods were also comprehended, and of all expressions indicating whether the same *identical* goods are to be forthcoming, or goods of the same *value* or *amount* only. There are no clear expressions, (if any expressions,) in the contract, going to any of these important particulars. Admitting that the personal goods are embraced by the contract, the idea, that the same *identical* goods are to be returned, is refuted as well by the want of a stipulation to that effect, as by the character and nature of the articles: many of them were articles of consumption, and subject to decay, and would even perish through the mere efflux of time, before the days of payment had arrived. And, as to the *amount* to be restored, why was it not stated, if it were intended, that it should be so restored, and whether an *aggregate* amount of the articles would be sufficient, or whether the same amounts of the several distinct classes would do. These considerations, added to the general objection of giving a *lien* upon mere fluctuating and perishable property, would turn the scale against a construction embracing them, unless there are clear and sufficient expressions to be found in the instrument to shew the contrary. There are none such in this contract. After the lapse of nearly two pages from the conveying part of the contract, it is found necessary to ascertain, more particularly, how the title can be conveyed from the *Yeisers* to the Appellant. *That* certainly did not relate to the personal subject; to which the *Yeisers* had no claim. It provides that the real estate shall be conveyed from *Yeiser's* representatives to *F. Price* and *M'Mechen*, from them to *Cumberland D. Williams*, and from him to *M'Mechen*, *Purviance* and

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*McDowell*, "in trust to secure the payment aforesaid, and general-  
"ly the true performance of the agreement on the part of Cumber-  
"land D. Williams." It is argued that this conveyance is not  
to C. D. Williams; and that, as the personal property, as well  
as the real, is conveyed to him by the first part of the contract,  
that is only covered by this general expression.

In addition to the remark, that it requires more than a general and ambiguous expression to subject personal property of this kind to a lien like the present. It is here to be remarked, that naturally this expression, "conveyed to him as aforesaid," refers to the conveyance from the Yeisers, (the last antecedent,) and, especially, when it is, at the same time, provided that the land thereby conveyed should be placed in the hands of trustees as before mentioned, to secure the payment of the purchase money. This, then, it would seem, was the pledge provided; and I rather think these two circumstances, and especially the last, which defines the land as the security for the purchase money, would turn the scale in confining the lien to the real, in exclusion of the personal subject. It cannot be justly said that the personal fund is included, because the real one is insufficient. Exclusive of the difficulties, unavoidably arising from comprehending the personal fund, under the vagueness of this contract as relating to it, the parties were the proper judges of the sufficiency of the real fund. It is competent to a party to agree to rely on even an incompetent fund: but, in this case, it is not shewn, as at the date of the contract, that it was incompetent; and the Appellee might justly have counted on the improvements, which he believed the Appellant would have placed, (and which he alleges he did place) upon the same.

If this view of the subject is correct; if the personal goods are not embraced by the lien; and if the consent of the Appellant has only been expressed that they should be bound so far as they were on hand at the time of his offer to restore them, it would seem that we go full far enough in subjecting him to make good, such as were lost by his wilful default and misconduct.

If these goods were at all intended to be subject to restoration, by the contract, they were not the identical goods; for

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they had perished by time, and were consumed or worked up from the raw material. It was not the *amount* thereof, which was to be restored; for there is no such stipulation in the contract, and there was no inventory thereof taken; a measure of great importance in that view. If the personal goods were at all intended, it could only be in this sense, that, as the Appellant received, with the works, all the floating articles necessary to carry them on, and all the stock then on hand, so, in the event of a restoration, the Appellant's stock on hand of the same articles, should be forthcoming to the Appellee. There was a confidence existing between the parties, (admitting that the contract embraced the *personal* goods.) that the Appellant would not *diminish* the fund; a breach of which confidence, however, by any gross default on his part, would subject him to a reparation in damages. This confidence might well have been placed in the Appellant. He had this manufacture much at heart on an extended scale; and was, besides, owner of another fourth part of these works, and could not have destroyed the interest of the Appellant in the personal subject, without at the same time destroying his own. So, too, this view, in event, would have been beneficial to the Appellee: in giving him *more* of the articles of this class than he conveyed to the Appellant. The Appellant might have placed on the premises more of these articles, than he received; and it is only by losing sight of the ideas of the parties at the date of the contract, by attending to *posterior* facts, resulting from imperfect and unfinished reports, that we can infer the contrary. The true rule in expounding contracts, as well as Wills, is, to keep an eye upon the instrument and the state of things *as at the date thereof*, exclusion of posterior events or circumstances.

But it is supposed that the Appellant is personally responsible, to the amount of the goods conveyed, notwithstanding the express stipulation in the agreement to the contrary; from the NEGATIVE clause therein, that he shall be no farther bound than "*the said property so as aforesaid conveyed to him will extend.*" This *negative* way of creating a charge is rather novel. In addition to other answers to this idea, inferrable from what I have already said, this argument proves too much. Taken strictly, it would prove that there should be *no* fund at

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all for this payment, as far as the perishable goods may have disappeared; although abundant goods of the same character were still on the premises: and if it is meant that the same *amount* of the goods shall be liable, I answer; 1st, That this is not provided for in the contract; and 2dly, That this idea is in conflict with the provision, which confines the *lien* to the property "so as *aforesaid* conveyed;" a provision which wholly excludes all articles afterwards acquired. This is a dilemma, from which the Appellee can only escape by agreeing that the *lien* extends to the real subject only, or that it only extends to the personal subject under the view, the Court is disposed to take of it; namely, the *continued* personal fund in the hands of the Appellant at the time in question, subject to reparation for injuries as *aforesaid*. This measure of relief I am willing to give to the Appellee; and it is more than I would have consented to have given him, had it not been for the seeming consent of the Appellant.

I will here remark, that this idea of the worthy Judge is in utter collision with the prayer of the Appellee's bill. He best knew the extent of his own rights; and, in his bill, he only claimed that "the *real property*, sold to the Appellant by the "articles of March 13th, 1807, and so much of the personal "property *as remained*," might be sold: he does not require that such of the articles, as he delivered to the Appellant, and were not on hand, should be found and delivered to him, as forming a part of this fund; a claim that would have equally existed for him, under the Judges construction of the contract.

These are the remarks I have thought it proper to add: for the rest of my opinion, I refer, as *aforesaid*, to the Decree which is to be delivered.

The President, on the 29th of March, 1817, delivered the following as the Opinion and Decree of the Court.

The Court is of opinion, that, in making the purchase of the property in question, by the Appellant from the Appellee, it was competent for him to stipulate, that the purchase money should be only paid out of the property purchased, in exoneration of the person and other property of the said Appel-

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lant. That such stipulation may not have been unreasonable in relation to a subject peculiarly uncertain as to its success and value; and that the stipulation in question, in the agreement before us, is so clear and explicit to this effect, as to leave no doubt (in exclusion of other testimony) as to the real intention of the parties.

It is further the opinion of the Court, that the Appellant may have been influenced by the consideration of this exemption, in agreeing to give for this property nearly double the sum, for which he had purchased an equal portion of the same interest, from *Joseph Williams*, not a great while before; and that to hold him to the enhanced price, while his claim of exemption should be disregarded, would be irreconcilable as well with the principle of *equity*, as with the *positive* terms of his contract. The Court is further of opinion that, while the sum agreed to be given for this property, as well as the time and manner of payment, is fixed by the contract; and while the Appellant stands exonerated from personal responsibility, as aforesaid, the property subjected to the *lien*, in lieu thereof, is to be considered as a *pledge*; as liable to raise, by sale, all the sum due, or so much thereof, as it may be adequate to produce; and that the balance thereof, if any, should enure to the benefit of the Appellant.

While this principle is admitted, it follows, that the Appellant, in the event of his inability to comply with his contract for the payment of the purchase money, may relinquish his eventual interest in the balance as aforesaid, and give up, in absolute property, to his Creditor, the whole of the pledged subject, and thereby exonerate himself from the payment of the Debt: such Creditor having no right to complain, that, instead of having a right to charge the subject, to pay his debt, *that* subject is given up to him in absolute property.

The Court is further of opinion that, if, (as the case is in the present instance,) the conveyance of the property pledged, or a part thereof, has not been completed in favour of the Appellant, it would be unnecessary, and improper, in the event of such surrender, to go on and perfect the same; but that, instead thereof, the contract for such conveyance should stand annulled; and that there is no necessity, in such case,

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to convey the property to the Appellant, merely that he might re-convey it to the Appellee; nor is there any necessity, in such case, to charge the property by the process of any Court; but, the debt being discharged by the delivery of the pledged property, it may be used, or sold, by the Creditor, at his discretion.

In ascertaining what is the true subject, oppignorated in the present instance, the Court cannot but see, that, while apt and appropriate expressions are used in the Deed to convey to the Appellant, as well the *personal* subject, appertaining to the Furnace, as the Furnace itself, and the Land, on which it is erected, there are no words of the former character found in that part of the contract, which created the *pledge*; and that, taken on the contract merely, it is, at least, somewhat doubtful whether the personal subject is thereby embraced or not. Nor does the Court see that it can look into the testimony in relation to the intention of the parties, as to this particular, without infringing the settled rules for expounding contracts; nor that it ought to hold the Appellant bound by the *admission*, that the personal subject is embraced by the contract, contained in his letter of the 17th December 1808; as the offer therein made tended to a *compromise*, and was not accepted.

The Court is also of opinion that, although personal, and even transitory, and fluctuating property, may be made the subject of a *lien*, at the pleasure of the contracting parties, it should seem that explicit words should be used to effect such purpose; the want of which, in the case before us, is another circumstance, making it at least doubtful whether the personal subject is comprehended as a part of the *pledge*, or not.

While these circumstances are borne in mind by the Court, it is deemed a liberal course to allow that the personal subject is embraced by the contract in this case, as well as the real.

This construction is only admitted, because it seems just, (especially, in a case, in which a personal exemption has been stipulated,) that the property purchased should be considered liable for the debt; and because the parties themselves seem, in several instances, to have expounded the contract in this sense. But this concession, in the opinion of the Court, goes far enough. We ought not to go further, and view a personal

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and perishable subject, as if it were a real one. We ought not to make the same construction in relation to a fluctuating, transitory and perishable property, as if it were permanent.

Although the terms of the contract are *general*, that the "*property, agreed to be conveyed*" to the Appellant, shall be held liable to discharge the debt, it is not to be construed so strictly, as that the personal property shall be embargoed and tied up from use; nor that, in the case before us, even the same kind and amount of property, shall be forthcoming in future, as the *pledge*.

In the case before us, the personal subject consisted of perishable articles, provisions, and articles of consumption, raw materials, which were to be worked up, implements necessary for the Furnace, and horses, waggons, &c. The idea, that the same identical articles were to be restored, is refuted by their nature and properties as aforesaid. Nor can we consider that the same *amount* is to be restored, on any other hypothesis, than that the Appellant is the insurer against the accidents to which this property is so liable. That idea is also refuted by the consideration that no stipulation to that effect is inserted; and because no inventory of the kinds and value of the property was taken. The true solution is, that, as a common fund of these articles was received by the Appellant, with the works, the fund, which he should *leave* of the same articles, should be restored by him, and considered as the *pledge*.

There was a confidence that the Appellant would not dilapidate and waste this property unnecessarily; both because it was necessary to carrying on the manufacture, which he had so much at heart, on an extended scale, and because he was under the further check, that he could not destroy the Appellee's portion of the articles, without, at the same time, destroying his own.

If, however, these checks were not sufficient, we are willing to go further, and subject the Appellant, by an issue of *quantum damnificatus*, to make good all the waste of the personal property pledged, which arose from his *fraud, wilful default or misconduct*.

Pursuing these principles, the Court is of opinion that the personal property on hand, at the time of the offer to return it as aforesaid, as well as the debts then due to the concern,

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should be considered, as the subject offered to be returned, (in addition to the real property,) and subject to the condition just mentioned. At that time a serious and explicit offer of this property was made, and refused by the Appellee. It was no longer incumbent on the Appellant to keep the works, or to keep the property together: and, if such property has been since destroyed, or dispersed, it is the Appellee's misfortune; but the property, that remains, is not exempted from the *lien*. Further than that, we cannot go, without compelling the Appellant to insure the property, after he had elected to restore it; and, as to liability for damage in the cases above mentioned, the Court supposes they have gone far enough, especially in a Court of *Equity*, when it is considered that *he* is not to be allowed for valuable improvements, which he may have (and which he alleges he has) placed upon the premises.

The Court is also of opinion, that there is nothing in the alleged objection that the Appellant had disqualified himself from delivering up the *pledge* in question.

As to the Mortgage to his brothers, *it may not, perhaps, cover the property in question*; but, if it did, that Mortgage had no existence at the time of the offer aforesaid. With respect to the alleged impediment of the *lease*, the objection comes with a bad grace from a plaintiff in a Court of Equity, seeking for a specific performance of a contract, and who has not performed *his contract*; a plaintiff, too, who, for several years, has wholly omitted to procure for the Appellant a title to the premises, or the estate contracted for. The want of this Title may have abridged the Appellant in his full use of the property, arising from the hazard of placing expensive improvements on property, from which, probably, he might be thereafter evicted. So, this want of title may have disabled the Appellant from selling the premises, (as many are willing to buy a *legal*, though not an *equitable* title,) and, by so selling, from paying the purchase money with the proceeds.

The Court is of opinion, therefore, that the Appellee has not entitled himself to make the objection in this instance: an objection, too, which, in a Court of *Equity*, subjects the Appellant to a *heavy forfeiture*. On the other hand, the Court is of opinion that the Appellant, by making the lease in question, has not disabled himself from substantially per-

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forming that condition. Had the offer of the Appellant been accepted by the Appellee, he might, for any thing appearing to the contrary, have obtained the instant possession of the property from *Joseph Williams*: and, if not, he could, under the terms of his lease, have obtained in a short time.

It would be highly inequitable, while the Appellee had failed, for years, to execute this contract, on his part, to compel the Appellant to occupy the premises in *person*, which must be the case, if he is interdicted from leasing it; nor is it to be forgotten, that this lease contains beneficial stipulations for the Appellee, in relation to the safety of the property leased.

On the whole the Court is of opinion, that the Decree be reversed with costs: and the Court, proceeding to make such Decree, as the said Superior Court ought to have rendered, it is decreed and ordered, that the Appellee may, under the direction of the Court of Chancery, have it ascertained what were the kinds, qualities and numbers of the personal property agreed to be conveyed by the contract aforesaid, and which were on hand, at the Furnace, and Belvedere Forge, on the 17th of December 1808, and that all these several articles of property shall be decreed to be delivered up to the Appellee, as his absolute property, subject to the just claims of others: that an account be taken of the sums, *due* to the partnerships aforesaid, on the said day, including that, alleged to be due from the *Yeisers*, (who for this purpose may be proceeded against in this suit: and that *Prices'* proportions of such sums be considered as due to, and recoverable by him: that the Appellee's one fourth of all sums of the said debts, received by the Appellant, *Price*, the day aforesaid, so far as they exceed payments made by him, on account of the concerns, or by any person for him, since the date aforesaid, be refunded to the Appellee by the Appellant, and he and his estate be held responsible therefor: that his one fourth of all rents, *due* for the premises by *Joseph Williams*, or others, after the date aforesaid, and now unpaid, be paid to the Appellee, and such as may have been received by the Appellant since that day be refunded by him, and he, and his estate, be also held liable therefor: that the Appellee shall have the benefit of the Covenants, on the part of *Joseph Williams*, contained in his lease from *Cumberland D. Williams*; and especially that



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for preserving, and restoring the personal property thereby conveyed; which the Court supposes may remedy much of the Appellee's complaint, respecting the waste and dispersion of the said property: that an issue, or issues, be directed, if required, to inquire into any losses, or damage, done to the personal fund aforesaid, through the fraud, wilful default, or misconduct of the Appellant, prior to the said 17th day of December, 1808; and that the same be also recoverable from the said Appellant, his estate, and effects; and that the Appellee be decreed to release to the Appellant the sum, or sums, due under his Contract. And the cause is remanded to the said Superior Court of Chancery, to be proceeded in, agreeably to the principles of this Decree.

Decided April  
1st, 1817.

### Garnett against Sam and Phillis.

1. If the case made by a Bill of Exceptions be, that the plaintiffs, suing for freedom, were brought into this State subsequent to the year 1786, and that the defendant asserts a claim to them on the ground that the Oath, prescribed by the 4th section of the Act of 1782, (1 R. C. ch. 103,) was duly taken by him or those under whom he claims; the other grounds of claim authorised by the last clause of the same section, (not being mentioned,) must be considered as excluded.

ON the trial of the usual issue, in an action, for freedom instituted in July, 1811, on behalf of the Appellees, against the Appellant, in the County Court of Spottsylvania, the plaintiffs offered in evidence two affidavits, shewing that they were brought into this State, by water, in the month of June 1787, according to one, and between 1787 and 1790, according to the other; that a Mr. Peck, who moved from the State of New Jersey to Virginia, said that he had brought them with him; that he treated Sam more like a white man than a slave; that he said, that Sam was as free as he was, and acted as his Overseer; that he had lived with him in New-Jersey; and that he and his family (Phillis being his wife) had agreed to come to Virginia in consequence of their mutual attachment.

2. The right of freedom, *prima facie*, acquired by a Slave imported into this State, subsequent to the year 1786, could only be obviated by evidence adduced to shew, or by circumstances authorizing a presumption, that the Oath required by law had been taken by the importer.

3. In the trial of a suit for Freedom, declarations of a person, who imported the plaintiffs, are not evidence in their favour; if it do not appear that those declarations were made during the time, when he claimed them as his slaves, and that the defendant claims under him.

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To these Affidavits going to the Jury as evidence, the defendant objected; but the Court over-ruled his objection; (1) to which opinion he filed a Bill of Exceptions.

The plaintiffs, by their Counsel, moved the Court to instruct the Jury that, "if they were satisfied that the plaintiffs were brought into this State subsequent to the year 1786, the defendant, who attempted to defend himself under the proviso contained in the 4th section of the Act, entitled, 'An Act to reduce into one the several Acts concerning Slaves, Free Negroes and Mulattoes,' must, in order to entitle himself to the benefit of that proviso, shew that he had taken the Oath prescribed and required thereby:" but the Court refused so to instruct the Jury: to which opinion of the Court the plaintiffs excepted.

The Jury found a Verdict for the defendant. The plaintiffs moved for a new trial, and, again, excepted to the opinion of the Court, over-ruling that motion; setting forth, in their second Bill of Exceptions, the two Affidavits aforesaid, as "*all the evidence given on either side to the Jury.*" Judgment was entered, according to the Verdict, which, on an Appeal to the Superior Court of Law, was reversed, on the ground, that the Court had erred in refusing to give to the Jury the instruction, requested by the plaintiffs; and the cause was retained in the Superior Court for a trial of the issue to be had therein. From this Judgment of reversal the defendant appealed to this Court.

*Stanard for the Appellant.* The instruction asked for was upon an abstract point, and does not appear to have arisen in the cause. But if the point was fairly presented by the evidence, the Court ought not to have given the instruction; because the defendant might have claimed the slaves by "*descent, marriage, or devise,*" and therefore have been entitled

(1) Note. In the Record, previous to the trial, was an entry, in these words: "At a Court continued and held for the said County, the 6th day of April 1813, came the parties. &c. and, by consent of the said parties, by their Attornies," the Affidavits of *Mary Greenlaw* and *William Greenlaw*" (which were the Affidavits in question,) "*are to be taken this afternoon, to be read as evidence in this cause absolutely:*" and, by the like consent, the cause was then continued at the defendant's costs.

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to protection, under the farther exceptions in the Act of 1785, re-enacted in 1792. (a)

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*Wirt contra.* The Instruction requested was a proper one, and such as the Court was bound to give. It was not upon a

(a) 1 R. C. ch. mere abstract point, but obviously upon a point which *might* have arisen, and *did arise* in the cause. (b) The case must be taken from the Bill of Exceptions. It was the business of the defendant, if he relied upon any of the farther exceptions in the law, to have inserted that fact.

103. § 4. p. 187.  
(b) *Shelton v. Cocks, Cranford and Co.* 3 *Munf.* 191.

A *general* objection is taken to the depositions, as not legally admissible; but *no particular* objection appears.

As to the objection to *hearsay* evidence; in a case of this sort it is out of the question. (c) But the evidence here is of declarations by *Peck*, the man, who imported the plaintiffs; which is not *hearsay*.

(c) *Jenkins v. Tom*, 1 *Wash.* 123.

*Stanard* in reply. This is the first time I ever heard that, when papers are introduced, which *prima facie* are not evidence, it is necessary to make *specific* objections.

Who is Mr. *Peck*? Why are the rights of *Garnett* to be affected by his declarations? There is no proof of any connexion between *Garnett* and *Peck*.

The case of *Jenkins v. Tom* relates only to *pedigree*. The subject in dispute cannot alter the rules of evidence.

The Judgment of the County Court *in substance* was correct, even if the refusal to give the instruction were wrong: because there was no legal evidence in the cause.

But the Court did right in leaving it to the Jury. Might not the Jury well presume that the plaintiffs were brought into the State conformably with law, when they had been held as Slaves therein upwards of thirty years? (1) The Court very properly refused to say that the defendant was bound to prove that the Oath had been taken *by him*. He did not import them. Could any thing have been more preposterous than

(1) Note. This appears to have been a mistake of Mr. *Stanard*. The time which elapsed between June 1787, the most remote time alleged as that, in which the negroes were brought into the State, and July, 1811, when the suit was instituted, was only *twenty-four* years and one month. The *Verdict* was found in 1813.

such an instruction? I have always understood that the party *who excepts* is bound to shew that the Court's opinion was incorrect.

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The Jury might well presume, from the circumstances, that the Oath had been taken. No provision for perpetuating the evidence of it is made in the law, which does not even say that it shall be reduced to writing. After such a length of time, when every Magistrate, who lived in the County at the time of importation, and every person, connected with the transaction, was dead, the burthen of proof ought surely not to be imposed upon the defendant. It would be a most formidable decision, that every descendant of a slave, brought in since 1787, is entitled to freedom, unless it can *now* be proved that the Oath was taken by the importer, and within sixty days after the importation. Even a grant from the Commonwealth, or a Deed, will be presumed after thirty years possession.

*Wirt.* Length of time, or staleness of demand, is no bar to a suit for freedom.

*April 1st, 1817,* Judge ROANE pronounced the Court's opinion.

The Court is of opinion that the case made by the second Bill of Exceptions in this cause is, that of the Appellee's having been brought into this state subsequent to the year 1786, and of a claim asserted to them by the Appellant, on the ground that the Oath, prescribed by the 4th section of the Act of 1792, (1 R. C. ch. 103,) has been duly taken by him, or those, under whom he claims; in exclusion of the other grounds of claim, authorized by the last clause of the same section.

On this case the Court is farther of opinion, that the right of freedom, *prima facie* acquired by the Appellees by such alleged importation, could only be obviated by evidence, adduced to shew, or by circumstances authorising a presumption, that such Oath had been taken; and that the terms of the instruction asked in this case were broad enough to include the latter description of evidence as well as the former.

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And, as the refusal of the County Court to give the said instruction may have absolved the Appellant from exhibiting, either such circumstances, or such evidence to the Jury, one or other of which is deemed to be indispensable, the Court is of opinion, that the said refusal was erroneous, and may have injured the rights of the Appellees on the trial.

The Court does not deem it important to decide on the admissibility of the affidavits objected to by the Appellant, because the Verdict and Judgment, being in his favour, would not be reversed for an error in that respect, if it existed. But the Court is of opinion that, if those affidavits are again offered in evidence upon the new trial, the declarations of *Peck*, therein stated, relative to the freedom of the Appellees, are to be withheld from the Jury, as it does not appear therein that those declarations were made during the time, in which the said *Peck* claimed the Appellees, nor that the Appellant claims under him; both of which ought to appear in order to make such Declarations evidence against the Appellant; and that there is no error in the Judgment of the said Superior Court of Law, which is therefore affirmed; and the cause is remanded for farther proceedings.

Decided April  
1st, 1817.

### Hook's Administrators against Hancock.

1. In an Action of Slander, brought by *Hancock*, against *Hook* in his life time. The words charged to have been spoken were laid several ways in the declaration; viz. that *Hook* said, 1st, "*G. Hancock* has *stolen* my slave;" 2d, "*G. Hancock* has *taken* my slave, and I will have him sent to the Penitentiary for it;" the plea being *justification*, "because the plaintiff did take a certain female slave, the property of the defendant, out of his possession, in such manner, and with such intention, as would subject him to such punishment;" to which the plaintiff replied *generally*, and issue was thereupon joined; it was decided, that, to support this plea of justification, it was sufficient for the defendant to shew that the slave, so averred to be his property, had been a long time in his possession as his slave, and was purchased by him as such; notwithstanding the pendency of a suit at that time, in her behalf for freedom; for, if her right to freedom could be inquired into in this action, an issue thereupon ought to have been tendered by the plaintiff, whereby the defendant might have known to what point to apply his evidence.

2. *Quære*, whether, in an Action of Slander between A and B, the right of C to freedom can be collaterally investigated?

Penitentiary for it;" 3d, "G. Hancock has robbed me of my slave, and I will send him to the Penitentiary for it."

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Hook pleaded, 1st, "*not guilty*," to the *whole* declaration; 2d, *Justification to the 2d Count*, "because the plaintiff, before, &c. did take a female slave named *Nan*, the property of the defendant, out of his possession, in such manner, and with such intention, as would subject him to the punishment mentioned by the defendant."

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nistrators  
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Hancock objected to the admission of the second plea, but the Court admitted it; and "thereupon the plaintiff replied "generally to the last mentioned plea of the defendant," and tendered an issue, which was joined. No issue was formally joined on the plea of *not guilty*.

At the trial, Hook filed two bills of exceptions to opinions of the Court, both presenting the same question; whether, as Hook proved, that he had been a long time in possession of the woman *Nan* as a slave, and had bought her, as such, from a person, who held her as such, and that Hancock had forcibly taken her out of his possession, pending a suit brought by her for freedom, it was competent to Hancock to prove, or for the Jury in this case to inquire into, the said *Nan's* title to freedom, by birth or otherwise, unless she had actually been emancipated, or had recovered her freedom by the Judgment of a Court of Justice.

The Court below held the affirmative. The Jury found that the defendant was guilty of, and not justified in, speaking the words in the declaration mentioned, and assessed the plaintiff's damages to one thousand dollars. Judgment accordingly: from which Hook appealed to this Court.

*Wirt* for the Appellant. The issue joined was not of a character to try the question made; for *Nan's* right to freedom could not properly be investigated, *collaterally*, in a trial between other persons.(a)

(a) *Dacosta v. Jones*, Comp 729;  
*Good v. Elliott*,  
3 Term Rep. 683.

*Leigh contra*. The special plea of justification to the second Count is quite too vague and general. It alleges that the plaintiff took the defendant's slave out of his possession, *in such manner, and with such intention*, as would incur penitentiary punishment; but does not state the particulars of the manner

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and circumstances of the taking, and thence infer the felonious intention. The Court therefore should have sustained the plaintiff's objection to the admission of that plea, in the stage of the cause, in which it was offered. But the objection was over-ruled: the plaintiff had then the alternative, either to demur, or go to issue on the plea: he was in a manner compelled to go to issue. If there be any uncertainties in the special pleadings, the defendant cannot complain: they arose out of the vague, loose, general terms of his own plea; and he should not be allowed to profit from its faultiness.

How ought the plaintiff to have replied to this plea? *De (a) 1 Chitty 559.* *injuria sua propria* was the proper replication: (a) and the Court will consider the *general* replication, mentioned in the record, as equivalent; especially since the defendant took issue upon it. I doubt if a *special* replication could have been devised, putting in issue the matters mentioned in the bills of exceptions, without being liable to the charge of *departure*.

What then, in fact, did the special pleadings, filed in the cause, put in issue? They put in issue, in direct terms, the question whether the person taken from the defendant was *a slave*; and whether she was *Hook's slave*? And they put in issue every circumstance that could affect the character of the plaintiff's conduct, in taking that person out of the defendant's possession; every circumstance that could shew, that the taking was felonious, or not felonious.

Now, the testimony, to which the defendant excepted, was introduced to prove, that the person taken from the defendant by the plaintiff was *not his slave*, but a *free person*: it therefore, in one point of view, met the issue directly. If the person so taken away was *free*; that, surely, was a circumstance affecting the character of the taking. The violent taking of a pauper, actually suing for, and entitled to her freedom, from a person claiming her as a slave, might have been a *breach of the peace*; or it might have been *maintenance*; but it is hardly possible it could have been a *penitentiary offence*; in other words, a *felony*.

The Bills of Exceptions do not profess to contain all the evidence adduced in the cause. If, from the nature of the case the freedom of the person taken away might have been a circumstance relevant to the issue; a circumstance which, in

connexion with other facts, might falsify the plea of justification; the Court will suppose the evidence was rightly admitted.

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*Nicholas* in reply. The question is, whether the evidence offered was admissible under the issue joined. If the plea was improper the plaintiff should have demurred to it. After issue was joined upon it, evidence not within the scope of the issue ought not to have been admitted. The replication rather admitted that the negro woman was a slave, but denied that the plaintiff had taken her away under such circumstances, as made the act felonious. The question made, was not whether she was a free person, or not. She might have been found free by the Jury in this case; and yet, in a suit for her freedom, might have been cast; another Jury finding her to be a slave.

*April 1st, 1817*, Judge ROANE pronounced the Court's opinion.

The Court is of opinion that, to support the plea of justification to the second Count in the declaration in this case, it was sufficient for the Appellant's Testator to shew that the slave *Nan*, in the first plea averred to be "*his property*," had been a long time in his *possession* as a slave, and was purchased by him as such; notwithstanding the pendency of a suit at that time by the said *Nan* for her freedom.

The Court is farther of opinion that, if it had been competent to the Appellee to inquire into her right to freedom, in this cause, an issue thereupon ought to have been tendered by him, whereby the Testator of the Appellants might have known to what point to apply his evidence. On this ground, the Court is of opinion, that the Judgment of the said District Court is erroneous, which is therefore reversed with costs, and the Verdict set aside: and, the said *John Hook* having departed this life, and the Court being of opinion that the action does not survive against his Executor or Administrator, it is ordered that the suit be abated.



Decided April  
3d, 1817.

### Shields against Oney.

1. If, by direction of the plaintiff, the Writ be served on one only of two partners in trade, when the declaration shews that the plaintiff knew the names of both; and he get a verdict upon the plea of *non assumpsit*, pleaded by the partner, on whom the Writ was served; Judgment ought to be arrested.

AN action of *assumpsit* was brought in the County Court of Montgomery, by the Appellant against *Oney and Lyle* as merchants and partners. By his direction, the Writ was served on *Oney alone*, and all the subsequent proceedings were against him, although the declaration filed in the cause was against *Oney and Lyle*. Issue being joined on the plea of *non assumpsit*, the plaintiff, at the trial, introduced a witness, who proved that, "between the 13th day of November, 1804, and the 9th day of December, in the same year, he acted as store-keeper for the plaintiff; that the plaintiff had an account, which he had charged against *Oney and Lyle* as partners; that, during that time, he, at the plaintiff's request, demanded payment from *Alexander S. Lyle*, who, it was admitted, was then a partner with the defendant *Oney* in the mercantile business; that *Lyle* said the account was just; but how much it amounted to, the witness could not say; whether one hundred or two hundred dollars; but thinks it was more than one hundred dollars; that *Lyle* left a Bond, which the witness thinks amounted to two hundred and fifty dollars, (being something more than the account,) to be collected and placed to his credit, but afterwards took it away." Another witness proved that the said *Lyle*, after the partnership between him and *Oney* had been dissolved, acknowledged an account against *Oney and Lyle*, dated in 1804, amounting to 35l. 1s. 3d.; said it was just, and that the goods had come to the partnership's use.

The plaintiff also introduced an Indenture, bearing date the 7th of June, 1805, between *Joseph Oney* and *Alexander S. Lyle*, by which *Oney* was empowered to settle the affairs of the partnership of *Oney and Lyle*, and pay its debts, so far as the funds, which in pursuance of the said Deed might come into his possession, would enable him; *Lyle* was to receive his share of any balance, that might remain in favour of the firm; but, in case of a deficiency, he was "by no means exonerated, but, on the contrary, was to pay his full proportion of the debts remaining due."

This being all the testimony on both sides, the defendant demurred to the evidence, and a conditional Verdict was found. Upon the demurrer, the County Court entered Judgment for the plaintiff. The defendant obtained a Writ of Supersedeas from the Superior Court of Law, which reversed the Judgment; as erroneous in this, that the acknowledgment of *Lyle*, that the plaintiff's claim was good against the partnership, was made *after the dissolution of that partnership*, and was the only evidence in the cause to charge *Oney*, who could not legally be bound by it, as *Lyle* was no party to the action; and that the first confession of *Lyle*, which was made *during the continuance of the partnership*, was not such, as could subject *Oney* to the demand.

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v.  
Oney.

From which Judgment, *Shields* appealed to this Court.

*Writ for the Appellant*, cited *Brown v. Belsches*, 1 Wash. 9, to shew that one partner may be sued alone, and that the plaintiff shall not be nonsuited at the trial, upon proof that there are other partners.

The *first* confession of *Lyle*, mentioned in the Demurrer, was sufficient to bind the partnership, and authorize a Judgment for the plaintiff.

April 3d, 1817, Judge ROANE pronounced the Court's opinion.

The Court is of opinion, that, although in actions against copartners, the plaintiff is bound to sue them all, he will be excused for not doing so, until, by a plea of abatement, he shall have been informed, who the other partners are: that an omission of such plea on the part of the defendant is a waiver of the objection by him; and that he shall not be admitted to give it in evidence on the trial, even although it should also appear, *in evidence*, that the plaintiff knew who the real partners were. This plea is not, however, necessary, nor shall such waiver result from its omission, in cases, in which it appears, *in the declaration*, that the plaintiff had already that knowledge, which it would be the object of the plea to afford. The Court is farther of opinion that a plaintiff is not more at liberty to omit proceeding against some of the partners, in cases, in which it appears, *from his declaration*, that he knew *originally* who they

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Oney.

were, than he would be, to do so, after he has obtained that knowledge from the plea aforesaid.

The case of *Brown v. Belsches* does not conflict with this idea; as, in that case, the other partner was exempted from farther prosecution, by the act of law, abating the suit as to him, and not, as in the case before us, by the act of the plaintiff. It cannot be said in this case that the Appellee could not be injured by the separate judgment against him. Every partner is liable to pay the whole debt; and it would be hard to subject one to the whole weight of the judgment in the first instance, and leave him to go for contribution against his partner. It might have been otherwise in this case, had it appeared to the Court that the Appellee's partner was (*quoad* him) released from his liability to pay the debt. *That*, however, does not appear, but the contrary, as is shewn by the deed made part of the demurrer to evidence.

Upon the Demurrer to Evidence, this Court would probably concur with the County Court; and thinks the Superior Court erred in its decision thereupon: but the Court is of opinion that the said County Court erred in giving judgment for the Appellant upon the Demurrer to Evidence, instead of arresting the judgment for the reasons now assigned. Both Judgments are therefore reversed; and, this Court proceeding, &c. it is farther considered, that the Appellant take nothing by his Bill, &c.

Decided April  
3d, 1817.

### Lemon against Reynolds Adm'r. of Holmes.

1. In a suit for Freedom, the validity of a Will, under which the plaintiff claims, ought not to be questioned; the same, (or a copy thereof, the original being destroyed,) having been admitted to record, as and for the last Will of the Testator, by the proper Court, whose Judgment remains, *unappealed from* and the validity of such Will not be contested in Equity. \* See 1 R. C. ch. 92. sect. 11; *Ford v. Gardner and others*. 1 H. and M. 72.

THIS was an action for Freedom, in behalf of the Appellant, against the Appellee, in the County Court of Kanawha.

The Jury found a special Verdict, in substance as follows; that *Joseph Holmes* was, in his life time, and until his death, the owner and proprietor of the plaintiff; that the said *Joseph*, on or about the 18th of May, in the year 1811, at the County of Kanawha aforesaid, being of full age, and of sound

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disposing mind, signed, sealed and published a paper writing purporting to be his last Will and Testament, which was executed and witnessed in the manner and form prescribed by law for executing and witnessing last Wills and Testaments, and contained a clause to the following effect; "Item, it is " my Will and desire that my negro man *Lemon* shall have " and enjoy his freedom after my death; and, for his attention " and friendship during my illness, that he shall have my sor- " rel horse, with a saddle and bridle, and ten dollars in cash;" that the plaintiff was the same negro man *Lemon* therein mentioned: that the said paper writing was destroyed in the life time of the said *Joseph* by inadvertency, without his knowledge or participation, and against his wish: that, after its destruction, he knew that the same was so destroyed, and expressed his regret that it had been done, and requested his friend, Col. *A. Donnelly*, jr. to write his Will over again; that he did not execute any writing, or express any wish that the provisions of the said paper writing, so destroyed as aforesaid, should not be carried into effect, or that the same should be revoked or annulled, or in any manner confirming the destruction thereof: that he departed this life before the institution of this suit; and that no paper was signed, sealed or published by him as his last Will and Testament, or as a Codicil thereto, other than the one so destroyed: that, on the 8th day of October 1811, Administration of his Goods, Chattels, &c. with the Will annexed, was in due form of law committed to the defendant; that, on the thirteenth day of August, 1811, a Writing, purporting to be a Copy of the last Will and Testament of the said *Joseph Holmes* was presented to the County Court of Kanawha, and, *with the testimony in support thereof was committed to Record. in hæc verba*: from which it appeared, that the clause before recited, in favour of *Lemon*, was contained therein; but, in one important respect, according to the testimony of three witnesses, the copy *differed from the original*; the *whole* of the residue of the Testator's estate, both real and personal, (after some small specific legacies, and paying all his just debts and funeral expences,) being devised to his sister, *Elizabeth McGuire*, according to the *copy*; but, *according to the original*, one half only to her, and

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Reynolds, &c.

the other half to a Mrs. *Conrad*: that the defendant *John Reynolds*, Administrator as aforesaid, forcibly took possession of the plaintiff, as of the goods and chattels of the said *Joseph Holmes*, deceased, and detained him in slavery.

Upon this Special Verdict, the County Court gave Judgment for the plaintiff; but, upon an Appeal to the Superior Court of Law, the same was reversed, and Judgment entered for the defendant; whereupon the plaintiff appealed to this Court.

*Leigh*, for the Appellant, cited the Act of 1792, (1 R. C. ch. 92. § 2.) also 7 *Bac.* 350., citing 1 *Eq. Cas. abr.* 409, *Hyde v. Hyde*; and *Comp.* 52, *Burtonsham v. Gilbert*, to shew that the original Will in this case could not be considered as revoked, but in full force.

No Counsel appeared for the Appellee.

*April 3d*, 1817. Judge ROANE pronounced the Court's opinion.

The Copy of the Will made part of the special Verdict in this case; having been received and *admitted to Record by the proper Court, as and for the last Will of Joseph Holmes*; and that Copy containing a clause, (as found by the Jury and spread upon the Verdict as part of the proceedings of the said Court,) which entitles the Appellant to recover his freedom, the Court is of opinion to reverse the Judgment of the Superior Court, and affirm that of the County Court.

## APPENDIX.

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[*The following opinion of Judge CABELL, in the case of Lightfoot's Executors v. Colgin and Wife, (ante p. 42—82.) was accidentally omitted in its proper place. It is therefore here inserted.*]

Judge CABELL. I concur, entirely, with the Judge, who has preceded me, in the full and various views, which he has taken of this important case; and deeming it unnecessary to travel over the same ground, which he has explored, I have but little to add.

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1813.

Lightfoot's Ex-  
ecutors and  
others  
v.  
Colgin & wife.

If the English decisions in cases, which depended on the Custom of London, be applicable to the case now before the Court, and be entitled to respect, there is an end of all controversy; for they would shew incontestably, that the Deed of Trust in the proceedings mentioned, executed by *Lightfoot* for his own use for life, and then for the benefit of the children of his first marriage, was a fraud upon the rights of his wife, the female Appellee, and ought to be set aside so far, as it conflicts with her interests. Their applicability does not depend, in any manner, upon the question, whether what is called the Custom of London was a general or a local law; was the remnant of the old common law, or the particular law of the city of London only. It must depend on the rights of the wife, and the incapacities of the husband, under the two systems, as compared with each other. If these rights on the one hand,

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and incapacities on the other, be the same, the decisions of the English Courts upon the custom of London, although that custom may never, as such, have had any force in this country, will be as much entitled to respect by our Courts, as are their decisions upon any Statute of the British Parliament corresponding with some Statute of our Assembly.

I will examine the custom of London so far as respects the husband and wife.

The custom does not impair the husband's power during his life. It leaves him an uncontrollable sway over his personal property. He may sell it, give it away, waste or destroy it; nor can the wife prevent or set aside the most improvident and ruinous alienations. But it imposes a restriction or limitation on the power of the husband to dispose of his property by his *Will*. He cannot dispose of more than one half from his widow, in case there be no children, nor more than one third in case there be a child or children. But this restriction or limitation does not operate to vacate, *ipso facto*, any *Will* that violates these proportions. The *Will* is void *as to the wife only*; and even as to her, it is void *only in case she objects to it*. If she objects to it, she is then entitled to the proportion assigned to her by the custom. But she cannot claim under the *Will*, and under the custom also. She must make her election. (*Preced. Chan.* 353. 2 *Vern.* 355—356.) This right of the widow to object to the *Will* of her husband, and to claim the portion of his estate, which is, in that event, assigned to her by the custom, is a right, which may be the subject of a contract; for, if a woman, before her marriage, accepts a settlement, this compounding, as it is called, shall bar her share under the custom. (2 *Bas. abr.* 255. and the cases there cited.) Thus far, there seems to be no difference between the rights and incapacities of the wife and of the husband under the custom, and under our laws; for here, as in England, the husband exercises absolute power over his property during the coverture. The only restriction, here, is, as under the custom, on his power of disposing of it by *Will*. (1 *Vol. Rev. Co.* 163.) His *Will*, however, whatever it may

be, will stand if not objected to by the widow. She may renounce the Will in all cases, (so far as relates to her); and then the law assigns her a certain portion of the estate, corresponding precisely with the custom, except as to slaves, of which she never has more than the use of one third during her life. She cannot claim under the law, and under the Will, any more than she could claim, in England, under the Custom and under the Will; but is driven to her election. It is also equally clear, that the right of the wife to object to the Will, and claim under the Law, is so far the subject of a Contract, that it may be barred by a settlement before marriage. It might be equally the subject of a contract during the coverture, but for the union of person of husband and wife. Being such a right, as may be the subject of a contract, it may also be the subject of a fraud.

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It is not necessary to pursue the analogy any farther. It has been shewn to be complete so far, as relates to the powers and incapacities of the husband under the two systems: and, as the question now to be decided relates to the validity of the act of the husband, I can perceive no reason why the English decisions are not applicable; and, as such, entitled to the respect, which is usually given to them in analogous cases. If they be thus respected, the cases referred to by the Judge, who has preceded me, are decisive of the question.

But if those cases were put entirely out of view, and the question were now to be considered, as an original one, my mind would, on general principles, be irresistibly led to the same conclusion.

An examination of those acts and alienations, which the husband may certainly do and make, with respect to his property, and of those, which he certainly cannot do and make to the disadvantage of his wife, will lead us to the reason, and, of course, to the sound construction of the law. As was before said, the husband may waste or destroy his property; he may sell or give it away. But these acts take complete effect in his life time. *They operate equally upon the husband and*



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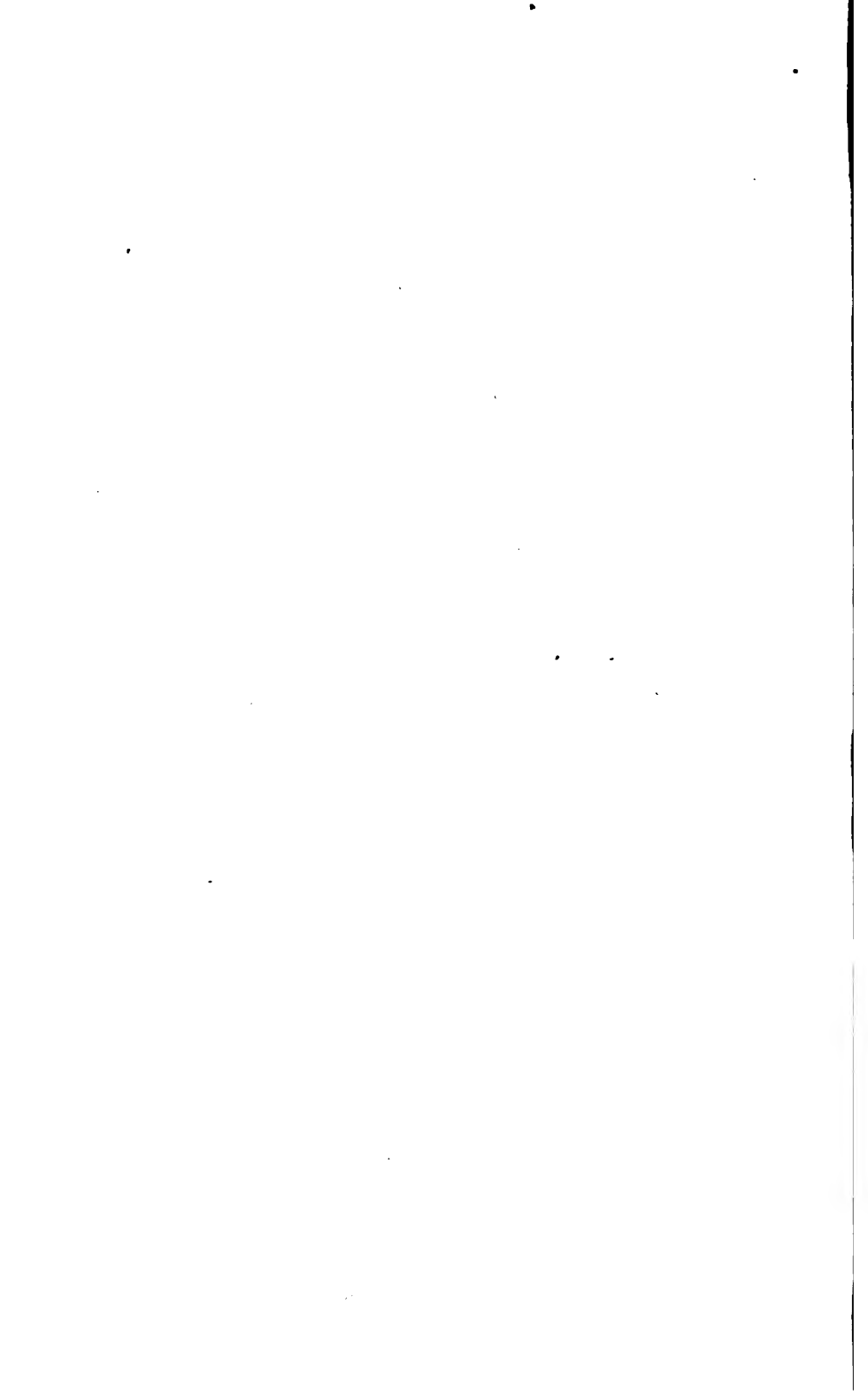
*wife.* Such is the union and identity of person of husband and wife, in legal contemplation, that the law confides her interests, during the coverture, to his exclusive guardianship. But this extends to such cases only, as take effect during the coverture. As to these, such guardianship may be safely entrusted to him, because he cannot affect her interest without affecting his own. As to these, therefore, he has absolute sway, without responsibility. But the law does not allow him to dispose, by *Will*, of more than a certain proportion of his estate, from his wife, without her consent; or rather if she chooses to object to it. Why this difference between a *Will* and other alienations? It arises from their different manner of operating. The latter operate upon husband and wife equally. A *Will* does not operate on the husband at all. It leaves him the ownership, the use and the benefit of the property as long as he lives, or is capable of feeling an interest in any thing, and disposes of it at the moment, when the connexion between husband and wife is at an end, and when the union of Interest no longer exists. The law, therefore, at that moment, resumes the guardianship of her rights, prevents her from being affected by his *Will*, without her consent, and places her in a rank superior to children, and inferior only to creditors. It is true that the terms of our Act of Assembly apply to a *Will* only. But laws are to be construed according to their spirit, and not restricted to their letter. The object of the Legislature was to prevent a man from enjoying his property during his life, and disposing of it from his wife at his death. The Deed of Trust, in this case, although not in the *form*, is in the *nature* of a *Will*. It is, in fact, a *Will* in disguise. Like a *Will*, it is voluntary. Like a *Will*, it leaves to *Lightfoot* the exercise of all the rights of ownership, and the whole use and benefit of the property during his life; and, like a *Will*, the interest which it parts with was not to commence in enjoyment, until his death. It is of no importance, in my estimation, that this Deed purported to be irrevocable. Considering the time and the circumstances, under which it was made, and the persons, in whose favor it was made, as also the immense

estate, which the grantor possessed, it was very improbable that he would ever wish to revoke it. As to *Lightfoot* then, and as to his wife, it was intended to operate as a Will. Had it been a Will in *form*, as well as *effect*, it would unquestionably have been unavailing as to the wife. But what the law will not tolerate, when done formally and directly, equity will not sanction when done indirectly, by fraud, trick and device. I am, therefore, of opinion that the Deed of Trust operates no bar to the rights of Mrs. *Lightfoot*, now Mrs. *Colgin*, and that she is entitled to the same portion of *Lightfoot's* estate, as if that Deed had never been made, and he had died intestate.

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# AN INDEX

TO THE

## PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.



### A

#### ABANDONMENT

1. See *Cass agreed*; and *Royall's adm'rs. v. Royall's adm'r.* pl. 1. p. 82.
2. See *Action*; and *Howitt & Co. v. Davis and Chalmers* pl 3 p. 34.
3. See *Assignes*; and *Medley v. Jones*, pl. 1. p. 98.

#### ABATEMENT OF LEGACIES.

1. See *Legacies*; and *Matthews Ex'or. of Garret v. Noel*, pl. 1. p. 468.

#### ACCOUNT.

1. What evidence is sufficient to establish an acknowledgment of, and promise to pay, a debt by account. *Dunbar v. Beale*, pl. 2. p. 24.
2. If a *fi. facias* against the goods of a Testator be levied on slaves, which by his Will were specifically bequeathed, and after his death were allotted to the Legatee by the Executor, who thereupon held them, and hired them out, as *guardian* for such legatee; a Court of Equity ought, by injunction, to stop the sale, until an account of the assets remaining unadministered shall be taken;

and upon such account, to decree, that the creditor shall be satisfied out of the residue of the estate of which the Testator died possessed; having regard to the rights of the several Legatees under the Will. *Scott and Wife v. Halliday and Hinton*, pl. 1 p. 103.

3. A creditor, having obtained a Judgment against an Executor as such, and sued out a *fi. fa. de bonis testatoris*, which proved ineffectual, may either re-sort to his action at law to establish a *devastavit*, or file a Bill in Equity against the Executor and Legatees, for an account of assets, and proportional contribution to pay the debt. *Sampson v. Paymes' Ex'or. and Legatees*, pl. 1 p. 103.
4. When a Commissioner is stating accounts between Executors and the estate of their Testator, if one of them, who had for collection the evidences of debts, due the estate, which might have been collected by him, be dead; his representative cannot object to his estate's being charged with those debts, unless the means be furnished of charging the surviving Executor therewith. *Currier's Ex'ors. v. Cutting and Wife*, pl. 1 p. 223.
5. In such case, the private account of each Executor, with the Testator in his lifetime, and with his Co-Executor, and all other accounts that are necessary to make a just

settlement of the matters in controversy ought to be taken, if requested; though not specifically put in issue in the cause. *Ibid.* pl. 2.

6. A Court of Equity ought not to direct an account to be taken, after a great lapse of time, and after acts of acquiescence, by the party demanding it, in a construction of his rights, which, if correct, would render such account unnecessary. *Bolling v. Bolling and others* pl. 3. p. 334.
7. See *Sureties*; and *Tinsley v. Oliver's adm'r. and heirs*, pl. 1. p. 419.
8. It is not equitable that a defendant to a Bill of Injunction, (in whose favour a judgment at law was rendered, for a sum of money which he paid as security for the complainant,) should except to a Commissioner's statement of the debits and credits between them, "to the time of the Judgment, on the ground" that, from the circumstances of the case, "and conduct of the parties, they considered their accounts as closed, and nothing due on either side;" and yet, should select, and rely upon, the Judgment as an item in his favour, in exclusion of the other items in the account. *Foster v. Clarke*, pl. 1. p. 430.
9. See *Legacies*; and *Matthews Ex'or. of Garnett v. Noel*, pl. 2. p. 460.

#### ACTION.

1. See *Assumpsit*; and *Buster v. Ruffner*, pl. 1. p. 27.
2. See *Execution*; and *Carrington v. Anderson*, pl. 1. p. 32.
3. If a factor or agent, having sold goods belonging to his principal, be ordered by him while they are yet *in transitu* not to deliver them to the buyer, of whose solvency doubts are entertained, and he deliver them notwithstanding such order, and without demanding any security for his indemnity, the principal is entitled to an action against him in case the buyer should prove insolvent. *Howatt & Co. v. Davis & Chalmers*, pl. 2. p. 34.
4. And such right of action is not waived or abandoned by expressions, used in letters from the principal, after the delivery of the goods, seeming to import an agreement to look to the buyer for payment, and not to the factor; nor by the principal's permitting considerable time to elapse before he informs the factor, categorically, that he will look to him and not to the buyer for satisfaction; provided such expressions, and such delay, on the part of the principal may have been occasioned by the factor's failing to make a full and fair disclosure of all facts and circumstances necessary to enable the principal to decide upon the subject, which it was the duty, and in the power of the factor to have given. *Ibid.* pl. 3. p. 34.

5. *Quere*, whether an employer who continues in his service an overseer noted for cruelty, may not be made liable, by an action upon the case, for the value of a hired negro whipped to death by such overseer, though without any direction from him? *Harris v. Nicholas*, pl. 5. p. 483.

#### ACTS OF ASSEMBLY.

1. Though private Acts of Assembly may be given in evidence without being specially pleaded, they are not to be taken notice of judicially, by the Court as public Acts are, but must be exhibited as documents, if not admitted by consent of parties. *Legrand v. Hampden Sidney College*, pl. 1. p. 324.
2. *Quere*, whether the Clerks of the Chancery District Courts of Richmond, Williamsburg and Staunton, and the Clerks of the Court of Appeals and General Court were constitutionally bound to give bond and security for performance of their official duties; being required to do so by an Act of Assembly enacted after they came into office? *Harriam Dance's case*, pl. 2. p. 349.
3. The Act of Assembly "concerning the sale" of property under Executions and incumbrances, passed February 1st, 1808, (2 R. C. p. 156,) applied to a sale of mortgaged land, by Commissioners in Chancery, after the first day of March, 1806; notwithstanding the Decree was pronounced, and the time limited for paying the money to redeem the land had elapsed, before the passage of that Act. *Woods Ex'or. and Miller v. Hudson and others*, pl. 2. p. 423.

#### ADMINISTRATION.

1. See *Husband and Wife*; and *Pickett & Wife v. Chilton*, pl. 1. p. 467.

#### ADMISSION.

1. The only effect of the omission of a Replication to an answer is, that all the facts stated in such answer are admitted. *Pickett and Wife v. Chilton*, pl. 4. p. 467.
2. A party is not bound by any admission of his, in an offer, tending to a compromise, which was not accepted. *Williams v. Price*, pl. 7. p. 507.

#### ADULTERY.

1. An Action of Crim. Con. being referred to Arbitration by rule of Court, if the Arbitrators refuse to hear testimony offered by the defendant, impeaching the credit of the plaintiff's witnesses, or touching the deportment of the plaintiff's wife, before her alleged seduction, this is such misconduct as vitiates their award; and the Court ought not to decline hearing proof of such misconduct. *Ligon v. Ford*, pl. 2. p. 10.

# ADVANCEMENT.

1. If a father make payments in part of a gaming debt of his son, and never reclaim them in his life time, but provide by his Will a fund for the payment of the balance; they should not, after his death, be claimed of his son's estate, but considered as payments, or advancements to the latter; as payments to the amount of any previous existing accounts of the son against the father; and, beyond that amount, as advancements to the son. *Carter's Executors v. Cutting and Wife*, pl. 3. p. 223.

# AGENT.

1. In case of a sale of personal property not executed by delivery, but to be consummated by delivery at another place; although, in consequence of earnest paid or otherwise, the property be so vested in the buyer, that, on complying or offering to comply with the contract on his part, he may recover the same from the seller or his agent; yet, until delivery, and while the goods are (in legal phrase) in transitu, the seller may, on the buyer's becoming bankrupt, or being likely to be so, arrest the goods, or order his agent to arrest them, which order, operating as an indemnity to the agent, in addition to that arising from his possession of the goods, will be his guaranty for refusing to deliver them; and, perhaps, under circumstances, the agent would also have a right to demand other security from his principal, which it would be incumbent on him forthwith to give under pain of a right in the agent to go on, and execute the contract by a delivery. *Honall and Co. v. Davis and Chalmers*, pl. 1. p. 34.
2. If a factor, or agent, having sold goods belonging to his principal, be ordered by him, while they are yet in transitu, not to deliver them to the buyer, of whose solvency doubts are entertained, and he deliver them notwithstanding such order, and without demanding any security for his indemnity; the principal is entitled to an action against him, in case the buyer should prove insolvent. *Ibid.* pl. 2. p. 34.
3. And such right of action is not waived or abandoned by expressions used, in letters from the principal, after the delivery of the goods, seeming to import an agreement to look to the buyer for payment, and not to the factor; nor by the principal's permitting considerable time to elapse before he informs the factor, categorically, that he will look to him, and not to the buyer for satisfaction; provided such expression, and such delay, on the part of the principal, may have been occasioned by the factor's failing to make a full and fair disclosure of all facts and circumstances necessary to enable the principal

to decide upon the subject, and which it was the duty and in the power of the factor to have given. *Ibid.* pl. 3. p. 34.

4. See *Assignee*; and *Medley v. Jones*, pl. 1. p. 98.
5. An Agent, endorsing a note for the benefit of his principal, who assures him that he shall not be held responsible, ought not to be compelled to pay the money at the suit of a person to whom the note is endorsed, with notice of such equity; but the decree should be against the principal. And, it seems, if the endorsee had no such notice, yet, if the principal be solvent, the decree ought still to be against him in the first place. *Chalmers Jones and Co. v. M'Murdo*, pl. 4. p. 252.
6. If a slave conveyed by Deed of Trust to secure the payment of a debt, be permitted to remain in the debtor's possession, who thereupon, by an agent, sends him out of the state, and sells him; such agent, not having actual notice of the lien on the slave, before he pays over the money to his principal, is not responsible to the Trustee, or the creditor; notwithstanding the deed was duly recorded. *Trevi v. Claiborne*, pl. 1. p. 435.
7. An employer or master is, in general, not responsible for a wilful and unauthorized trespass committed by his agent, overseer, or servant. *Harris v. Nicholas*, pl. 4. p. 483.

# AGREEMENT.

1. See *Assumpsit*; and *Jones v. Stevenson*, pl. 1 and 2. p. 1.
2. See *Assumpsit*; and *Dow v. Adams's Administrators*, pl. 1. p. 21.
3. See *Equity*; and *Sims's Administrator v. Lewis's Executor and others*, pl. 1. p. 29.
4. See *Contract*; and *Graham v. Hendren*, pl. 1. p. 185.
5. A purchaser of land, encumbered by a Deed of Trust (duly recorded) for securing a debt, having bought of the debtor, with consent of the Trustee, and paid the purchase money, by discharging the debt secured by the Deed, and by paying other sums of money; having also a Deed of bargain and sale from the debtor, (though not recorded within the time prescribed by law,) and being put in possession of the land, he was adjudged to have the preferable right to call for the legal estate outstanding in the Trustee, and to be protected against the claim of a creditor suing in Equity upon an agreement, on the part of the debtor, (bearing date before the purchase, but subsequent to the Deed of Trust,) to secure him by a Deed of Trust on the same land; of which agreement, the purchaser had no notice when he made the contract, and paid his money. *Williamson v. Gordon's Executors*, pl. 1. p. 257.

6. An Executor selling the land of his Testator, by virtue of a power given by the Will, is not bound to convey with *general Warranty* without an agreement to that effect, but only with *special Warranty*, against himself and all persons claiming under him; notwithstanding a written agreement *after the sale*, that he would make a *good and indefeasible title* to the purchaser; for such agreement is to be understood in reference to the terms of the sale. *Grantland v. Wight Executor*, &c. pl. 2. p. 295.
7. See *Exchange*; and *Stovall v. London*, pl. 1. p. 299.
8. A written agreement for sale of the lands of a corporation, though not with the common seal affixed, may be enforced in Equity. *Legrand v. Hampden Sidney College*, pl. 3. p. 324.
9. In a written agreement for sale of land, it was described as a tract which had escheated to the Commonwealth, and by the Commonwealth had been given to the vendor, who stipulated to make compensation, if a better title than his should thereafter be established. The title of the vendor appearing to be such as described, on a bill in his behalf for specific performance, the purchaser was not allowed compensation for locating and obtaining a patent for part of the land as *waste and unappropriated*, but was decreed to release his claim under the patent, before the vendor should be compelled to make him a deed: and a stipulation, conforming to the agreement, was directed to be inserted in such deed. *Ibid.* pl. 4.
10. If an agreement for sale of land be made subject to a condition, that the price thereof shall afterwards be ascertained by the parties; and one of the parties die, without agreeing upon the price; such agreement is too incomplete and uncertain, to be carried into execution by a Court of Equity. *Graham v. Cull Executor of Means*, pl. 1. p. 396.
11. An agreement to build a tavern in partnership, at the joint expense and risk, and for the joint benefit of the contracting parties, to be held by them in fee simple, decreed to be specifically performed, at the instance of a partner who furnished the ground for the purpose, and had fully performed the contract on his part; notwithstanding many of the partners were unwilling to carry it into effect, because, in their opinion, a change of circumstances had rendered the scheme unprofitable. *Birchell and others v. Bolting*, pl. 1 p. 442.
12. A stipulation that the property purchased shall be the *only security* for payment of the purchase money, in exoneration of the person and other property of the purchaser, is not repugnant, but valid and obligatory on the parties. *Williams v. Price*, pl. 4. p. 507.
13. In such case, the land is to be considered as a *pledge* liable to raise by sale the money due, or so much thereof as it may be adequate to produce; the surplus, if any, to *enure* to the benefit of the debtor. *Ibid.* pl. 5.
14. In the event of such debtor's inability to comply with his contract, he may relinquish his eventual interest in such surplus, and give up the land in absolute property to his creditor, thereby exonerating himself from the debt. And, if the conveyance of the land to the debtor has not been completed, it is unnecessary, in the event of such surrender, to go on and perfect the same; but, instead thereof, the contract for such conveyance should be annulled. *Ibid.* pl. 6.
15. Personal, and even transitory and fluctuating property may be made the subject of a *lien*, at the pleasure of the contracting parties; but, generally, *explicit words* should be used to effect that purpose, where such *lien* is not raised by operation of law or equity. *Ibid.* pl. 8.
16. It seems just, however, that the property purchased should be considered liable for the purchase money; especially in a case in which a personal exemption of the purchaser has been stipulated; and where the parties themselves, by their subsequent acts appear to have expounded the contract in that sense. *Ibid.* pl. 9.
17. If personal property, consisting of perishable articles, provisions, raw materials for manufacture, implements necessary for a furnace, &c. be pledged, together with the furnace and land, for payment of the purchase money; the *lien* is not to be construed so strictly as to tie up the property from use, nor that even the same kind and amount of property shall be forthcoming in future; without a stipulation to that effect: but the purchaser is bound to make good only such waste thereof as shall have arisen from his *fraud, wilful default or misconduct*, and to give up what remains on hand when he surrenders the property in satisfaction of the debt. *Ibid.* pl. 10.

## ALIENS.

1. A Testator devised his real estate in Virginia to his Executors, to be sold by them, or the survivor of them, *at such time, and in such manner, as they or the survivor of them should judge most advantageous*; and gave and bequeathed the money arising from such sales, and the *rents and profits of the said lands, which might accrue before the sales, to his sisters who were aliens*; subject, nevertheless, to the payment of his just debts, and of certain legacies to his Executors. *Quere*, whether, under this Will, the title of the alien sisters was good

against the Commonwealth, claiming the money for which the lands were sold; the Testator having died without any lawful heir, and his personal estate being sufficient to pay his debts. *Commonwealth v. Martin's Executors and devisees*, p. 117.

2. A Testator bequeathed to his brothers David and James, (who were aliens,) "to be equally divided between them, the money arising from the sale of his land and other property, and from the debts due to him at the time of his death; and, as they resided in Great Britain, it was his Will that his Executors make remittances to them, in Bills of Exchange, or in any other mode, as soon as they could." This was adjudged to be a good devise; so that a sale and conveyance by the Executors was effectual to the purchaser; and that the land did not escheat to the Commonwealth in consequence of the Testator's dying without heirs. *Commonwealth v. Selden and Sealdon*, pl. 1. p. 160.
3. The 12th section of the Act of Congress, passed September 24th, 1789, entitled, "An Act to establish the Judicial Courts of the United States," does not extend to cases in which citizens are joint defendants with aliens, or with citizens of other states, and have also essential interests in the cause which may be effected by a removal into the Federal Court. *Williams v. Price*, pl. 1. p. 507.
4. *Quære*, whether that section extends to any case, in which citizens are joint defendants with aliens, or with citizens of other states. *Ibid* pl. 2.
5. *Quære*, whether the provisions of that section be authorised by the Constitution of the United States. *Ibid* pl. 3.

#### AMENDMENT.

1. After issue joined, and the cause set for hearing, the defendant in Chancery may be permitted, *for good cause shewn*, to amend his answer, and to plead the statutes of frauds and limitations. *Jackson's assignees v. Cutright and Clark*, pl. p. 308.
2. A mistake of the defendant's counsel, in advising him that he could avail himself of the defence without pleading, is sufficient ground for leave to file the pleas in addition to the answer. *Ibid* pl. 2.
3. If two writs of *scire facias* be successively issued, the returns on which are both defective; and the defendant, after pleading specially, obtain leave to withdraw his plea as having been improvidently pleaded, the Court ought not thereupon to permit the Sheriff to amend both his returns, but only that on his first writ; quashing the second writ, and remanding the cause to the rules for farther proceedings. *Lee & Fitzhugh v. Chilton*, pl. 2. p. 407.

#### ANSWERS.

1. After issue joined and the cause set for hearing, the defendant in Chancery may be permitted, *for good cause shewn*, to amend his answer, and to plead the statutes of frauds and limitations. *Jackson's assignees v. Cutright and Clark*, pl. 1 p. 308.
2. A mistake of the defendant's counsel in advising him that he could avail himself of the defence without pleading, is sufficient ground for leave to file the pleas in addition to the answer. *Ibid* pl. 2.
3. The Clerk's stating in the transcript of the Record, that certain Answers, which are filed, and copied in such transcript, were not noticed by the Court, is not to be relied upon by the Appellate Court, if the contrary may be inferred from the decree itself. *Pickell and Wife v. Chilton*, pl. 2. p. 467.
4. If the caption of the Decree names as defendants to the cause, certain persons whose answers are filed; and the Decree states that the cause was heard upon the Bill, *Answers and Exhibits*; it may be inferred that the Answers of those persons were noticed by the Court. *Ibid* pl. 3.
5. The only effect of the omission of a Replication to an Answer, is that all the facts stated in such Answer are admitted. *Ibid* pl. 4.

#### ANSWER IN CHANCERY.

1. An evasive Answer (though not excepted to as such) outweighed by the testimony of one witness and circumstances. *Wilkins v. Woodfin adm'r. of Perre*, pl. 2. p. 183.
2. See *Equity*; and *Scott and Wife &c. v. Gibbon & Co., &c.*, pl. 2. p. 86.

#### APPEALS.

1. In an action on the case for consequential damages occasioned by the erection of a mill, if the damages recovered be less than one hundred dollars, the defendant cannot appeal to the Court of Appeals; notwithstanding it appears from the Record that the right to erect the mill was drawn in question. *Skipwith v. Young*, pl. 1. p. 276.
2. A High Sheriff, against whom a Judgment is rendered for the default or misconduct of his deputy, is entitled to recover of such deputy, not only the amount of the original Judgment, but all additions thereto arising from coroners' commissions included in a forthcoming bond, costs of a Judgment on that bond, and costs and damages on appeals, or writs of *superse-deas*, until its final affirmation by the Court of Appeals. *Stomers Ex'or. of Brugg v. Smith's Ex'or.* pl. 2. p. 401.
3. The Clerk's stating, in the transcript of the Record, that certain Answers, which are filed, and copied in such transcript, were not noticed by the Court, is not to be relied upon by the Appellate Court, if the contrary may



be inferred from the Decree itself. *Pickett and Wife v. Chilton*, pl. 2, p. 467.

### APPEALS, (COURT OF.)

1. The Act of January 10th, 1815, on the subject of writs of *Habeas Corpus* does not authorize the issuing of a Writ of Error by the Court of Appeals to a Judgment discharging from custody a person confined by sentence of a Court Martial for failing to pay a fine imposed on him for not appearing at the place of rendezvous, and not marching in obedience to a requisition of militia; for, in such case, there is no discharge, by the Judgment, of a person from the service of this State or of the United States. *Attorney General v. Fenton and Shepherd*, pl. 1 p. 282.
2. The Clerk of this Court being required, by an Act of Assembly, enacted since he came into office, to give bond and security for performance of his official duty; the Court considered it not proper to dispense with, or sanction the non-execution of such bond, or to pronounce any opinion as to the consequences of his failing to do so; but left it to him to execute the same or not, at his own peril, to be adjudged of, in case of failure, by a Court having competent jurisdiction of the case. *Harrison Dance's Case*, pl. 1 p. 349.

### ARBITRATION.

1. A submission to Arbitration held a waiver of objections to previous proceedings in the cause. *Ligon v. Ford*, pl. 1. p. 10.
2. An action of *Crim. Con.* being referred to Arbitration by Rule of Court, if the Arbitrators refuse to hear testimony offered by the defendant, impeaching the credit of the plaintiff's witnesses, or touching the deportment of the plaintiff's wife before her alleged seduction; this is such misconduct as vitiates their award; and the Court ought not to decline hearing proof of such misconduct. *Ibid* pl. 2.
3. See *Equity*; and *Dust v. Conrad and others*, pl. 1. p. 411.
4. See *Authority*; and *Ibid*. pl. 4.
5. See *Award*; and *Manlove v. Thrift*, pl. 1. p. 493.

### ARREST OF JUDGMENT.

1. See *Assumpsit*; and *Dow v. Adams's adm'rs*. pl. 1. p. 21.
2. In an action of *Assumpsit* in the Superior Court of a County, the Declaration's laying the venue in a different County, and omitting to state that the cause of action arose within jurisdiction of the Court, is not error sufficient in arrest of judgment. *Buster v. Ruffner*, pl. 1. p. 27.
3. In debt on a Bond, with condition to perform an Award to be made by certain Arbitrators; the condition being made a part of the record

by Oyer, and the defendant having pleaded "conditions performed;" the plaintiff may set forth the Award, and aver a breach of the condition, by a special replication; not having done so in his declaration: but, if he neglect to do this, and reply generally, judgment ought to be arrested after a verdict in his favour. *Gress v. Bailey*, pl. 1. p. 246.

4. In such case the proceedings, subsequent to the plea, should be set aside, and a Repleader awarded. *Ibid*. pl. 2. p. 246.
5. If, by direction of the plaintiff, the writ be served on one only of two partners in trade, when the declaration shews that the plaintiff knew the names of both, and he get a verdict, upon the plea of *non-assumpsit*, pleaded by the partner, on whom the writ was served; judgment ought to be arrested. *Shields v. Oney*, pl. 1. p. 350.

### ASSETS.

1. See *Account*; and *Scott & Wife v. Halliday and Hinton*, pl. 1 p. 103.
2. See *Legatees*; and *Sampson v. Payne's Ex'or. and Legatees*, pl. 1. p. 176.
3. A loan of slaves, though not declared by deed in writing duly recorded, and therefore void as to creditors, the loanee having continued in possession five years without such demand as would bar the right, is nevertheless effectual between the parties and their representatives. If, therefore, the loanee die in possession of such slaves, they are not to be considered assets, belonging to his estate, nor can be recovered as such, being liable to his creditors, so far as their claims remain unsatisfied by the Assets in the hands of his executor or administrator, but no farther. *Boyd and Swenson, and others v. Steinbeck and others* pl. 2. p. 305.
4. In such case, if the Assets be deficient, a Court of Equity will give the creditors relief, on a Bill on their behalf against the lender and the Executor or Administrator of the loanee, making the Assets liable in the first place so far as they extend; after which, it will allow the lender a limited time to make good the deficiency, and, in default thereof, direct a sale of the slaves. *Ibid*. pl. 3.

### ASSIGNEES.

1. See *Equity*; and *Taylor v. Ficklin*, pl. 1. 2. 3. p. 25.
2. A Bond to stay Execution was assigned for value received, without notice to the assignee of any Equity against it, and after dissolution of an injunction to the judgment. The security in said Bond, who was also Attorney in fact for the principal obligor, paid it off, without Execution and without any particular instruction to do so: after which, the Chancellor reinstated the injunction. It was held

that such payment by the Attorney in fact was a waiver of the Equity in behalf of the principal, who, therefore, notwithstanding the reinstatement of the injunction, was not entitled to recover back the money paid. *Medley v. Jones*, pl. 1. p. 98.

3. In debt by the Assignee of a Bond, it is not a sufficient plea, that, before notice of the assignment, the effects of the assignor were attached in the defendant's hands, and a decree entered that he should pay the debt to the attaching creditors, &c.; and that, accordingly, he had made such payment, it appearing, by the pleadings, that the Bond was assigned before the attachment was instituted, and suit brought upon it by the assignee before the payment made. *Wilson v. Davison*, pl. 1. p. 178.
4. In debt on a Bond in behalf of the survivor of two joint assignees, a declaration charging that the defendant has not paid the debt to the obligee or to the plaintiff, without averring also that he did not pay it to the other assignee in his life time, is bad on general demurrer. *Nicholson v. Dixon's heir*, pl. 1. p. 198.
5. See *Fraud*; and *Robertson & Co. v. Williams and Smith*, pl. 1. p. 331.

#### ASSIGNMENT.

1. The holder of a Bill of Exchange, with several endorsements in blank, has a right to strike out the names of the endorsers subsequent to the first, and to write over the name of the first endorser an assignment to himself; or the Bill, without such assignment will be considered as his property, by his having it in his power to make it. *Ritchie & Wales v. Moore*, pl. 1. p. 388.
2. A Bill of Exchange does not lose its negotiable character by being protested; but, after protest, may be assigned, or transferred without assignment. *Ibid.* pl. 2.
3. In an action by the assignee against the maker of a promissory note, the defendant cannot set off against it a Bill of Exchange for which the assignor is responsible, unless it appear that such Bill was his property before he received notice of the assignment. *Ibid.* pl. 3.
4. If the assignee of a mortgage, having obtained a decree of foreclosure and sale, become himself the highest bidder; but, in consideration of a sum of money in hand, and a promise of the assignor to pay, in a short time, the balance of the debt for which the assignment was made, he agree to hold the property as security for said debt, but in trust for the assignor; a Court of Equity will compel him to give up and recover the property, upon the assignor's paying him the balance due on the Bond, with the costs of the foreclosure and sale, deducting therefrom not only the actual profits he received while

he held the property, but such profits as, but for his wilful default, he might have received, and also the amount of any waste or dilapidations committed by him, or suffered by his neglect. *Southgate v. Taylor*, pl. 1. p. 420.

5. The assignee of a Bond may recover of the assignor, after suing the obligor, and obtaining a Judgment, and Execution with a return of *nulla bona*; notwithstanding his Attorney directed that appearance bail be not required of the obligor. *Harrison's Adm'r. v. Raine's Adm'r.* pl. 1. p. 456.

#### ASSUMPSIT.

1. See *Delivery of goods sold*, No. 1: and *Jones v. Stevenson*, pl. 1. p. 1.
2. See *Pleading*, No. 2: and *Ibid.* pl. 2.
3. In the action of *assumpsit*, if no consideration for the promise be laid in the declaration, Judgment ought to be arrested, notwithstanding it be founded on a written agreement. *Moseley v. Jones*, p. 23.
4. See *Account*, No. 1; and *Dunbar v. Beale*, pl. 2. p. 24.
5. See *Venue*, No. 1; and *Buster v. Ruffner*, pl. 1. p. 27.
6. A general verdict in *Assumpsit*, assessing entire damages, on several Counts, none of which are defective, is not erroneous. *Ibid.* pl. 2.
7. See *Answer*; and *Wilkins v. Woodfin adm'r.* of *Pearce*, pl. 1. p. 183.
8. In *assumpsit*, if there be several Counts in the declaration, the defendant should be charged, as having "failed to pay the several sums of money aforesaid, and every part thereof." If this be not done, but the breach charged at the end of the Count be, "that he hath not paid the said sum of money;" and it appear, upon a demurrer to evidence, that all the evidence adduced by the plaintiff applies only to the first Count, Judgment ought to be given for the defendant. *Ellis v. Turner Adm'rs.* pl. 1. p. 196.

#### ATTACHMENT.

1. In debt by the assignee of a Bond, it is not a sufficient plea that, before notice of the assignment, the effects of the assignor were attached in the defendant's hands, and a decree entered that he should pay the debt to the attaching creditor, &c.; and that accordingly, he had made such payment; it appearing, by the pleadings, that the Bond was assigned before the attachment was instituted, and suit brought upon it, by the assignee, before the payment made. *Wilson v. Davison*, pl. 1. p. 178.
2. An Attachment ought not be awarded against a party for refusing obedience to a decree, which as yet remains general and uncertain, and the extent of which as it relates to him,

he cannot ascertain without applying to the Court for a farther decree. *Birchett and others v. Bolling*, pl. 2. p. 442.

#### ATTORNEY IN FACT.

1. See *Assignee*; and *Medley v. Jones*, pl. 1. p. 98.

#### AUTHORITY.

1. In a suit against the vendor of a slave, if he refer the controversy to arbitration, without being authorized to do so by the vendor, (who had bought and sold the slave *bona fide*.) and when he might have cast the plaintiff, in the ordinary course of law, he has no remedy in equity against such vendor, in the event of his losing the slave by an award. *Dust v. Conrod*, pl. 1. p. 411.

#### AVERMENT.

1. See *Assumpsit*; and *Jones v. Stevenson*, pl. 2. p. 1.
2. See *Breach*; and *Ellis v. Turner's adm'r.* pl. 1. p. 188, and *Nicholson v. Dixon's heirs*, pl. 1. p. 198.
3. See *Award*; and *Green v. Bailey*, pl. 1. p. 246.

#### AWARD.

1. See *Evidence*; and *Ligon v. Ford*, pl. 2. p. 10.
2. In debt on a Bond, with condition to perform an Award to be made by certain Arbitrators; the condition being made a part of the Record by *Oyer*, and the defendant having pleaded "condition performed," the plaintiff may set forth the Award, and aver a breach of the condition by a special *Replication*; not having done so in his declaration; but, if he neglect to do this, and reply generally, Judgment ought to be arrested after a verdict in his favour. *Green v. Bailey*, pl. 1. p. 246.
3. See *Equity*; and *Dust v. Conrod & others*, pl. 1. p. 411.
4. If, pending a suit, the parties, by an order of Court, refer the matter in controversy to Arbitrators, whose Award is to be made the Judgment of the Court, and afterwards, by an agreement under seal, appoint a *substitute* for one of them; agreeing that an Award, to be made by the remaining Referees and such substitute, shall be entered as the Judgment of the Court; such Award may be entered without any previous order of Court confirming the appointment of such substitute. *Manlove v. Thrift*, pl. 1. p. 493.

#### B

#### BAIL.

1. See *Evidence*; and *Stowers Ex'or. of Bragg v. Smith's Ex'rs.* pl. 1. p. 401.
2. On a writ of *scire facias* against Bail, a return by the Sheriff that the defendant is no inhabitant of his bailiwick, and is not found within

the same is not a sufficient return of *nil*; but it should be stated also, that he has nothing in the bailiwick by which he could be summoned. *Lee & Fitzhugh v. Chilton*, pl. 1. p. 407.

The assignee of a bond may recover of the assignor, after suing the obligor, and obtaining a Judgment, and Execution with a return of *nulla bona*, notwithstanding his attorney directed that appearance bail be not required of the obligor. *Harrison's adm'r. v. Rains's adm'r.* pl. 1. p. 456.

#### BAR.

1. See *Assumpsit*; and *Jones v. Stevenson*, pl. 1. p. 1.
2. See *Bond*; and *Cooke v. Graham's adm'r.* pl. 1. p. 173.

#### BARGAIN AND SALE.

1. A Deed of Bargain and Sale, admitted to record on the acknowledgment of the Bargainer in Court, without any actual delivery thereof to the Bargainee, was determined to be good in law as a Deed delivered; the Bargainee having entered upon the land immediately after the purchase; having paid a part of the purchase money; retained possession according to the bargain, and, upon being informed of the Deed, approved thereof, and claimed title to the land thereby intended to be conveyed. *Commonwealth v. Selden & Seldon*, pl. 2. p. 117.
2. The finding of an Inquest of Echeat in favour of the Commonwealth will not take away the title of a purchaser claiming by a deed of Bargain and Sale, legally executed and recorded before the inquest was sealed; though without the knowledge of the Bargainee until afterwards. *Ibid.* pl. 3.

#### BILL IN CHANCERY.

1. See *Anner*; and *Scott and wife & others v. Gibbon & Co & others*, pl. 2. p. 86.

#### BILL OF EXCEPTIONS.

1. See *Exceptions (Bill of)*; and *Broom v. Cooper's heirs*, pl. 1. p. 7.
2. If the case made by a Bill of Exceptions be, that the plaintiff, suing for freedom, were brought into the state subsequent to the year 1786, and that the defendant asserts a claim to them on the ground that the oath, prescribed by the 4th section of the Act of 1792, (1 R. C. ch. 103,) was duly taken by him or those under whom he claims the other grounds of claim, authorized by the last clause of the same section, (not being mentioned,) must be considered as excluded. *Garnett v. Sam & Phillis*, pl. 1. p. 542.

#### BILLS OF EXCHANGE.

1. The holder of a Bill of Exchange, with several endorsements in blank, has a right to

strike out the names of the endorsers subsequent to the first, and to write over the name of the first endorser an assignment to himself; or the bill, without such assignment, will be considered as his property, by his having it in his power to make it. *Ritchie and Wales v. Moore*, pl. 1. p. 348.

2. A Bill of Exchange does not lose its negotiable character by being protested; but, after protest, may be assigned, or transferred without assignment. *Ibid.* pl. 2.
3. In an action by the assignee against the maker of a promissory note, the defendant cannot set off against it a Bill of Exchange for which the assignor is responsible, unless it appear that such bill was his property before he received notice of the assignment. *Ibid.* pl. 3.

### BONDS.

1. See *Equity*; and *Taylor v. Ficklin and others*, pl. 1. 2, 3. p. 25.
2. See *Sheriffs*; and *Currington v. Anderson*, pl. 1. p. 32.
3. See *Immaterial Issue*; and *Beatty v. Smith and others*, pl. 1. p. 39.
4. See *Assignee*; and *Medley v. Jones*, pl. 1. p. 98.
5. The condition of a Bond being, "whereas the obligor did lend to J. W. \$2500 of the obligee's money, and the said J. W. having failed, but before he failed paid \$500; and whereas the said obligor hath instituted a suit against said J. W. for the recovery of said money; now if the said obligor shall pay the whole sum so lent, if it can be recovered, from the said J. W., or, in case it cannot be wholly recovered, will lose the one half that sum which cannot be recovered, then the above obligation shall be void, otherwise remain in full force and virtue;" a plea stating, "that he the said obligor could not recover of J. W. or his endorser the sum of money in the said condition mentioned, or any part thereof, and that he paid to the obligee one half of the sum which could not be so recovered, and the further sum of \$500," is a good and sufficient plea in bar to an action upon the Bond; without any further averment, that the said obligor had used due diligence in prosecuting the suit against J. W.; and without stating what measures he had taken to recover the money, or who the endorser was. *Cooke v. Graham's Administrator*, pl. 1. p. 172.
6. In debt by the Assignee of a Bond, it is not a sufficient plea that, before notice of the assignment, the effects of the assignor were attached in the defendant's hands, and a decree entered that he should pay the debt to the attaching creditor, &c.; and that, accordingly, he had made such payment; it

appearing, by the pleadings, that the bond was assigned before the attachment was instituted, and suit brought upon it by the assignee, before the payment made. *Wilson v. Davison*, pl. 1. p. 178.

7. To prevent circuitry of action, and attain the ends of natural justice, a Court of Equity will completely indemnify one of the sureties in a bond, by means of a lien on the property of the principal obligor existing in favour of the other surety; notwithstanding he has himself relinquished a lien on the same property originally created for his indemnification. And, for this purpose, the Court will compel the creditor, (all the parties interested being before it) to resort to that property in the first place for satisfaction of his debt. *West v. Belches*, pl. 3. p. 117.
8. A Bond, for prosecuting a Writ of *supersedas*, being executed by a surety only, without any principal obligor, is insufficient; and a *supersedas* issued thereupon ought to be quashed. *Miller v. Blannerhassett*, pl. 1. p. 197.
9. In debt on a Bond, in behalf of the survivor of two joint assignees, a declaration charging that the defendant has not paid the debt to the obligee or to the plaintiff, without averring, also, that he did not pay it to the other assignee in his life time, is bad on general demurrer. *Nicholson v. Dixon's Heir*, pl. 1. p. 198.
10. See *Executions*; and *Stone v. Painter*, pl. 1. p. 287.
11. A vendor of land, by executing a conveyance and taking Bond and security for the purchase money, discharges the land from his equitable lien; even while it continues the property of the purchaser. *Wilson, &c. v. Graham's Executors, &c.* pl. 1. p. 297.
12. See *Sureties*; and *Tinsley v. Oliver's Administrator and Heirs*, pl. 1. p. 419.
13. The assignee of a Bond may recover of the assignor, after suing the obligor, and obtaining a Judgment, and Execution with a return of *nulla bona*; notwithstanding his attorney directed that appearance bail be not required of the obligor. *Harrison's Administrator v. Raines's Administratrix*, pl. 1. p. 456.
14. Where the principal and interest due on a Bond amount to more than the penalty, and damages are found by a verdict; Judgment ought not to be entered for the penalty and costs, to be discharged by the principal and interest, with the damages so assessed, and the costs; but for the penalty and damages, (if not exceeding those laid in the Writ,) and the costs. *Tennant's Executor v. Gray*, pl. 1. p. 494.
15. But if the damages found by the Jury exceed those in the Writ, a new trial ought to be granted, unless the plaintiff will release the excess of damages; if which be done, Judg.

ment may be entered for the penalty, with the residue of the damages so found, and costs. *Ibid.* pl. 2.

16. A stipulation, in a Bond or Deed of Trust, that, upon the debtor's failing at any time to pay the annual interest, the principal sum, (which otherwise would not be payable until a distant day) shall be considered due, is in the nature of a penalty, against which it is the province of a Court of Equity to relieve. *Mayo v. Judah*, pl. 1. p. 495.

### BREACH.

1. See *Equity*; and *Sims's Administrators v. Lewis's Executor and others*, pl. 1. p. 29.
2. In *assumpsit*, if there be several counts in the declaration, the defendant should be charged as having failed to pay the several sums of money aforesaid, and every part thereof. If this be not done, but the breach charged at the end of the last count be, that he hath not paid the said sum of money and it appear, upon a demurrer to evidence, that all the evidence adduced by the plaintiff applies only to the first count, judgment ought to be given for the defendant. *Eltis v. Turner's Administrators*, pl. 1. p. 196.
3. In debt on a Bond, in behalf of the survivor of two joint assigners, a declaration charging that the defendant has not paid the debt to the obligee or to the plaintiff, without averring also that he did not pay it to the other assignee in his life time, is had on general demurrer. *Nicholson v. Dixon's Heir*, pl. 1. p. 198.
4. Where the extent of the plaintiff's right under a covenant depends, in part, upon extrinsic testimony, the Court ought not to instruct the Jury, "that if, upon the said evidence they shall be of opinion that certain facts are established, then the defendant has broken his covenant as charged in the declaration;" for it is not competent to the Court to say whether such facts are sufficient, or not, to warrant such conclusion, unless the sufficiency thereof had been duly submitted to its judgment by a demurrer to the evidence. *Hollingsworth v. Dunbar*, pl. 1. p. 199.
5. The breach of covenant charged in the declaration, being that, during a specified period of time, the defendant deprived the plaintiff of the water necessary for his Mill, by diverting it therefrom, and suffering it to be diverted by others; the plaintiff is not limited, in proving acts committed by the defendant or other persons, to the period stated in the declaration, but may prove previous acts, in consequence of which, the injury was sustained during that time. *Ibid.* pl. 2.

### C.

### CAPTION.

1. If the caption of the decree names, as defendants to the cause, certain persons, whose answers are filed; and the decree states that the cause was heard upon the bill, answers and exhibits; it may be inferred that the answers of those persons were noticed by the Court. *Pickell and Wife v. Chilton*, pl. 3. p. 467.

### CASE AGREED.

1. A son being possessed of a life estate in certain slaves, with a contingent limitation, to his mother and her heirs, upon his dying without issue living at the time of his death; the mother died in his life time, leaving him her only heir; and he afterwards died, without such issue: the administrator of the mother brought an action of detinue for the slaves, against a person who was one of the co-heirs and distributees, and also one of the administrators of the son, (but not charged as such in the declaration,) and obtained a Judgment, upon a case agreed, by which the parties rested the decision of the cause upon certain specified points of law; viz. whether the limitation to the mother was legal and valid; and whether, (notwithstanding her death in the life time of the son, who was her only heir,) the slaves, so limited to her on his death, became vested in her administrator: it was decided that such case agreed did not abandon or relinquish the title of the administrators of the son to the slaves in question; but the recovery was had in subordination to their ulterior right, arising from the circumstances, that all the debts of the mother had been paid by the son in his life time; that he died greatly indebted; and that the slaves in question were necessary to pay his debts; which circumstances, (though mentioned in the case agreed,) were not included in the points thereby submitted. *Royall's Administrators v. Royall's Administrator*, pl. 1. p. 82.

### CHARGE.

1. See *Gaming Debts*; and *Carter's Executors v. Cutting and Wife*, pl. 5. p. 223.
2. See *Legacies*; and *Matthews Executor of Garnell v. Noel*, pl. 1. p. 460.

### CHANCERY.

1. After issue joined, and the cause set for hearing, the defendant in Chancery may be

permitted, for good cause shown, to amend his answer, and to plead the statute of frauds and limitations. *Jackson's Assignees v. Cutright and Clark*, pl. 1. p. 308.

2. A mistake of the defendant's counsel, in advising him that he could avail himself of the defence without pleading, is sufficient ground for leave to file the pleas in addition to the answer. *Ibid.* pl. 2.
3. The several Superior Courts of Chancery have jurisdiction in cases where their process is served, upon the defendant, within their respective districts; though his place of residence, and also the land in controversy, be in a different district. *Hughes v. Hall*, pl. 1. p. 481.

### CHILDREN.

1. See *Deed*; and *Lightfoot's ex'ors. & others v. Colgin & Wife*, pl. 1. p. 42.
2. *Fallenng hogs* are not comprehended in a bequest to one of the testator's children, of the stock belonging to the place whereon he lived. *Kendall's ex'or. &c. v. Kendall &c.* pl. 3. p. 272.
3. A Bill in Equity in behalf of persons, suing as "children" of a deceased residuary legatee for his share of the residuum, cannot be sustained; it should appear that the plaintiffs are the administrators, or other legal representatives of such legatee. *Huy's ex'or. and others v. Hays & others*, pl. 1. p. 418.
4. To effect the manifest intention of a Testator, the word "children" may be taken as synonymous with "issue." In this case, therefore, a devise of slaves to a married woman, "to her and her children forever," was construed to her and her issue; the Court being of opinion that the word "children," was not intended to denote the devisee, or devisees, who never were to take, nor to reduce the portion of the interest of the mother in and to the slaves before given to her in the same clause, but to declare the duration of her interest therein. *Merryman v. Merryman & others*, pl. 1. p. 440.

### CITIZENS.

1. The 12th section of the Act of Congress, passed September 24th, 1789, entitled "an Act to establish the Judicial Courts of the United States," does not extend to cases in which citizens are joint defendants with aliens, or with citizens of other states, and have also essential interests in the cause, which may be effected by a removal into the Federal Court. *Williams v. Price*, pl. 1. p. 507.
2. *Quare*, whether that section extends to any case in which citizens are joint defendants with aliens, or with citizens of other states? *Ibid.* pl. 2.

3. *Quare*, whether the provisions of that section be authorized by the Constitution of the United States? *Ibid.* pl. 3.

### CLERKS.

1. The Clerk of this Court being required, by an Act of Assembly enacted since he came into office, to give bond and security for performance of his official duty, the Court considered it not proper to dispense with, or sanction the non-execution of such bond, or to pronounce any opinion as to the consequences of his failing to do so; but left it to him to execute the same, or not, at his own peril, to be adjudged of in case of failure, by a Court having competent jurisdiction of the case. *Harrison Duncas's case*, pl. 1. p. 349.
2. *Quare*, whether the Clerks of the Chancery District Courts of Richmond, Williamsburg and Staunton, and the Clerks of the Court of Appeals and General Court were constitutionally bound to give bond and security for performance or their official duties; being required to do so by an Act of Assembly enacted after they came into office? *Ibid.* pl. 2.
3. See *Decree*; and *Pickett & wife v. Chilton*, pl. 2. p. 467.

### CODICIL.

1. The addition of a Codicil to a Will is not sufficient to operate as a devise of lands purchased by the Testator between the date of the Will and the date of the Codicil; there being no words in the Codicil indicating such to be the intention of the Testator. *Kendall's ex'or. &c. v. Kendall & others*, pl. 1. p. 272.

### COLLEGE.

1. The Trustees of a College being incorporated may sue by their corporate title without setting out their individual names. *Legrand v. Hampden Sidney College*, pl. 2. p. 324.

### COMMISSIONS.

1. Although, under peculiar circumstances, an allowance may be made to executors, in addition to the Commissions given to attorneys for collecting debts confided to them, such addition of commission ought not, in general, to be allowed where the debtors reside in or near the neighbourhood of the Executors, who consequently might collect the monies themselves. *Carter's ex'ors. v. Cutting and wife*, pl. 9. p. 224.

### COMMISSIONERS IN CHANCERY.

1. See *Mortgage*; and *Wood's ex'or. & Miller v. Hudson & others*, pl. 1. & 2. p. 423.

## COMPENSATION.

1. A purchaser of land, suing for breach of a contract to make a good title may with propriety come into a Court of Equity for pecuniary compensation, instead of proceeding at law in the first instance, if the vendor has conveyed away his property in trust whereby there might be a difficulty in obtaining satisfaction of his judgment when recovered, the vendor or his lawful representative, together with the trustees and *cestuys que trusts* being made defendants to the bill. *Sims's adm'r. v. Lewis's ex'ors. & others.* pl. 1 p. 29.
2. See *Equity*; and *Crenshaw v. Smith and others*, pl. 1. p. 415.

## COMPROMISE.

1. A party is not bound by any admission of his, in an offer, tending to a compromise, which was not accepted. *Williams v. Price*, pl. 7. p. 507.

## CONDITION.

1. The Condition of a Bond being, "whereas the obligor did lead to J. W. \$2500 of the obligee's money, and the said J. W. having failed, but before he failed paid \$500; and whereas the said obligor has instituted a suit against said J. W. for the recovery of said money; now, if the said obligor shall pay the whole sum so lent, if it can be recovered from the said J. W., or, in case it cannot be wholly recovered, will lose the one half of that sum which cannot be recovered, then the above obligation shall be void, otherwise to remain in full force and virtue;" a plea stating, "that he the said obligor could not recover of J. W. or his endorser, the sum of money in the said condition mentioned, or any part thereof, and that he paid to the obligee one half of the sum which could not be so recovered, and the farther sum of five hundred dollars," is a good and sufficient plea in bar to an action upon the bond; without any farther averment that the said obligor had used due diligence in prosecuting the suit against J. W.; and without stating what measures he had taken to recover the money, or who the endorser was. *Cooke v. Graham's adm'r.* pl. 1. p. 172.
2. A father having undertaken, by written agreement, as surety, for the payment of a gaming debt of his son; and, afterwards, by his Will, (reciting that he had so become surety,) having devised to his son certain real estate charged with the payment of that debt; such charge is not a Condition precedent binding the son or his representatives to pay it; but he and they shall hold the estate discharged thereof. *Cartier's ex'ors. v. Cutting & Wife*, pl. 5 p. 223.
3. In debt on a Bond, with Condition to perform an award, to be made by certain arbitrators;

the Condition being made a part of the record by Oyer, and the defendant having pleaded "Conditions performed;" the plaintiff may set forth the award and aver a breach of the Condition by a special Replication; not having done so in his declaration. But, if he neglect to do this, and reply generally, Judgment ought to be arrested after a verdict in his favour. *Green v. Bailey.* pl. 1. p. 246.

4. If an agreement for sale of land be made subject to a Condition, that the price thereof shall afterwards be ascertained by the parties; and one of the parties die, without agreeing upon the price, such agreement is too incomplete and uncertain to be carried into execution by a Court of Equity. *Graham v. Call ex'or. of Means*, pl. 1. p. 386.

## CONSIDERATION.

1. In the action of *assumpsit*, if no Consideration for the promise be laid in the declaration, Judgment ought to be arrested, notwithstanding it be founded on a written agreement. *Moseley v. Jones*, p. 23.

## CONSTITUTION OF VIRGINIA.

1. See *Act of Assembly*; and *Harrison Dence's case*, pl. 2. p. 349.

## CONSTRUCTION OF CONTRACTS.

1. The general usage and understanding of the people of this country in relation to the subject, is an important circumstance to be considered in the construction of a contract. *Harris v. Nicholas*, pl. 3. p. 463.

## CONSTRUCTION OF LAWS.

1. See *Mortgage*; and *Wood's Ex'or. & Miller v. Hudson and others*, pl. 1 p. 423.

## CONTRIBUTION.

1. A creditor having obtained a Judgment against an Executor as such and sued out: *fi. fa. de bonis testatoris*, which proved ineffectual, may either resort to his action at law to establish a *devisor's* or file a Bill in Equity, against the Executors and Legatees, for an account of assets and proportional contribution to pay the debt. *Simpson v. Payne's Ex'or. and Legatees*, pl. 1. p. 176.

## CONTRACT.

1. See *Equity*; and *Sims's adm'r v. Lewis's Ex'or. and others*, pl. 1. p. 29.
2. Where it appears that, at the time of entering into a Contract for sale of a tract of land, there was a misunderstanding between the parties, as to the identity of the land to which the Contract related, a Court of Equity, in its discretion, ought not to interfere by decreeing a specific performance. *Graham v. Hendon*, pl. 1. p. 185.

3. The first endorser of a note in point of time, is not of course first responsible. *Chalmers, James & Co. v. M. Murdo*, pl. 2. p. 25.
4. If the payee of a note write his name over that of a person, who endorsed it in blank, but refused to do so except upon the ground of the responsibility of the payee as first endorser, he thereby makes himself responsible, as such, in point of contract. *Ibid.* pl. 3.
5. It seems that payment of the purchase money is not sufficient part performance of a verbal Contract for land, to take it out of the statute of frauds. *Jackson's assignees v. Culright & Clark*, pl. 3. p. 308.
6. See *Construction of Contracts*; and *Harris v. Nicholas*, pl. 3 p. 483.
7. Personal and even transitory and fluctuating property may be made the subject of a lien, at the pleasure of the contracting parties, but, generally, explicit words should be used to effect that purpose, where such lien is not raised by operation of law or Equity. *Williams v. Price*, pl. 8. p. 507.
8. It seems just, however, that the property purchased should be considered liable for the purchase money; especially, in a case in which a personal exemption of the purchaser has been stipulated, and where the parties themselves, by their subsequent acts, appear to have expounded the contract in that sense. *Ibid.* pl. 9.
9. If personal property consisting of perishable articles, provisions, raw materials for manufacture, implements necessary for a furnace, &c. be pledged, together with the furnace and land, for payment of the purchase money; the lien is not to be construed so strictly as to tie up the property from use, nor that even the same kind and amount of property shall be forthcoming in future; without a stipulation to that effect: but the purchaser is bound to make good only such waste thereof as shall have arisen from his fraud, wilful default or misconduct, and to give up what remains on hand when he surrenders the property in satisfaction of the debt. *Ibid.* pl. 10.
3. The finding of an inquest of escheat in favor of the Commonwealth will not take away the title of a purchaser claiming by a Deed of bargain and sale executed and recorded before the inquest was sealed, though without the knowledge of the bargainee until afterwards. *Ibid.* pl. 3.
4. See *Executors & administrators*; and *Grantland v. Wight Es'or.* &c. pl. 2. p. 295.
5. A vendor of land, by executing a conveyance and taking bond and security for the purchase money, discharges the land from his equitable lien, even while it continues the property of the purchaser. *Wilson and others v. Brohm's Ex'ors &c* pl. 1 p. 287.
6. See *Derise*; and *Hundley v. Lyons*, pl. 4. p. 342.

### CORPORATIONS.

1. The trustees of a college, being incorporated, may sue by their corporate title, without setting out their individual names. *Legrand v. Hampden Sidney College*, pl. 2. p. 324.
2. A written agreement for sale of the lands of a corporation, though not with the common seal affixed, may be enforced in Equity. *Ibid.* pl. 3.

### COSTS.

1. See *Appeal*; and *Stowers adm'r. of Bragg v. Smith's Ex'or.* pl. 2. p. 402.

### COURTS.

1. See *Chancery*; and *Hughes v. Hall*, pl. 1. p. 431.

### COVENANT.

1. Where the extent of the plaintiff's right, under a covenant, depends, in part, upon extrinsic testimony; the Court ought not to instruct the Jury "that, if upon the said evidence they shall be of opinion that certain facts are established, then the defendant has broken his covenant as charged in the declaration;" for it is not competent for the Court to say whether such facts are sufficient or not, to warrant such conclusion, unless the sufficiency thereof had been duly submitted to its Judgment by a demurrer to the evidence. *Hollingsworth v. Dunbar*, pl. 1. p. 199.
2. The breach of covenant charged in the declaration being that, during a specific period of time, the defendant deprived the plaintiff of the water necessary for his mill, by diverting it therefrom, and suffering it to be diverted by others; the plaintiff is not limited, in proving acts committed by the defendant or other persons, to the period stated in the declaration; but may prove previous acts, in consequence of which the injury was sustained during that time. *Ibid.* pl. 2.

### CONVEYANCE.

1. See *Jurisdiction*; and *Taylor v. Ficklin*, pl. 1. p. 25.
2. A Deed of bargain and sale, admitted to record on the acknowledgement of the bargainee in Court without any actual delivery thereof to the bargainee, was determined to be good in law as a Deed delivered; the bargainee having entered upon the land immediately after the purchase; having paid a part of the purchase money; retained possession according to the bargain; and, upon being informed of the Deed, approved thereof, and claimed title to the land thereby intended to be conveyed. *Commonwealth v. Selden & Sedden*, pl. 2. p. 160.



3. A writing under seal being in these words; "for the hire of four negro fellows the present year, who are to be returned well clothed on or before the 25th of December, I promise to pay, &c.;" *Quere*, whether such writing contains a covenant to return the negroes, as well as to pay the money? *Harris v. Nicholas*, pl. 1. p. 483.
4. A Covenant, by a person hiring a slave, to return him at the end of the year, is not to be considered as a Covenant to insure such return in the event of his death in the mean time, although it be occasioned by a cruel and excessive beating, perpetrated by the overseer under whose superintendence he was put. *Ibid.* pl. 2.

## CREDIT.

1. That slaves were sold on a credit for more than a sum which the seller had previously offered to take for them in cash, with interest thereon during the time of credit, and that the seller was accustomed to lend money on usurious interest, is not sufficient evidence that such sale was intended as a cover for usury; there being no proof that a loan of money was intended by the parties. *West v. Belches*, pl. 1. p. 187.

## CREDITORS.

1. See *Fraud*; and *Thomas v. Soper*, pl. 1. p. 28.
2. See *Deed*; and *Scott and Wife and others v. Gibbon and Co. and others*, pl. 1. p. 86.
3. Five years peaceable and uninterrupted possession of slaves, under a loan not evidenced by deed duly recorded, vests a title in the loanee, which enures in favour of his creditors, and cannot be divested, as to them, by his returning the same to the lender, after the said five years have expired. *Garth's Executors v. Barksdale*, pl. 1. p. 101.
4. See *Agreement*; and *Williamson v. Gordon's Executors*, pl. 1. p. 252.
5. See *Loan*; and *Boyd and Sneyson and others v. Slainback and others*, pl. 1. 2. 3. p. 305.

## CRIM. CON.

1. See *Adultery*; and *Ligon v. Ford*, pl. 2. p. 10.

## CUSTOM.

1. See *Usage*; and *Harris v. Nicholas*, pl. 3. p. 483.

## D

## DAMAGES.

1. Whether, in an action for words, circumstances of suspicion, not amounting to full

justification, may be proven in mitigation of damages. *Chestnut v. Mayo*, pl. 1. p. 16.

2. A general verdict in assumpsit, assessing entire damages on several counts (none of which are defective,) is not erroneous. *Buster v. Ruffner*, pl. 2. p. 27.
3. See *Equity*; and *Sim's Administrator v. Lewis's Executor and others*, pl. 1. p. 29.
4. See *Execution*; and *Carrington v. Anderson*, pl. 1. p. 32.
5. In an action on the case for consequential damages occasioned by the erection of a mill, if the damages recovered be less than one hundred dollars, the defendant cannot appeal to the Court of Appeals, notwithstanding it appears from the record that the right to erect the mill was drawn in question. *Skipwith v. Young*, pl. 1. p. 276.
6. See *Judgment*; and *Slowers Executor of Bragg v. Smith's Executor*, pl. 2. and 3. p. 402.
7. Where the principal and interest, due on a Bond, amount to more than the penalty, and damages are found by a verdict; Judgment ought not to be entered for the penalty and costs, to be discharged by the principal and interest, with the damages so assessed and the costs; but for the penalty and damages, if not exceeding those in the Writ. *Tennant's Executor v. Gray*, pl. 1. p. 484.
8. But if the damages found by the Jury exceed those in the Writ, a new trial ought to be granted, unless the plaintiff will release the excess of damages, if which be done, Judgment may be entered for the penalty, with the residue of the damages so found and costs. *Ibid.* pl. 2.
9. See *Election*; and *Williams v. Price*, pl. 11. p. 507.

## DEBTS.

1. See *Evidence*; and *Dunbar v. Beale*, pl. 2. p. 24.
2. See *Immaterial Issue*; and *Beatty v. Smith and others*, pl. 1. p. 39.
3. See *Lands*; and *Carter's Executor v. Cutting and Wife*, pl. 6. p. 223.
4. See *Commissions*; and *Ibid.* pl. 9. p. 234.

## DEBTOR.

1. See *Pledge*; and *Williams v. Price*, pl. 5. and 6. p. 507.

## DECLARATION.

1. In the action of assumpsit, if no consideration for the promise be laid in the declaration, judgment ought to be arrested, notwithstanding it be founded on a written agreement. *Moseley v. Jones*, pl. 1. p. 23.

2. See *Arrest of Judgment*; and *Buster v. Ruffner*, pl. 1. p. 27.
3. See *Immaterial Issue*; and *Beatty v. Smith and others*, pl. 1. p. 39.
4. In *assumpsit*, if there be several counts in the declaration, the defendant should be charged as having failed to pay the several sums of money aforesaid, and every part thereof. If this be not done, but the breach charged at the end of the last count be that he hath not paid the said sum of money; and it appear, upon a demurrer to evidence, that all the evidence, adduced by the plaintiff applies only to the first count, judgment ought to be given for the defendant. *Ellis v. Turner's Administrators*, pl. 1 p. 96.
5. In debt on a Bond, in behalf of the survivor of two joint assignees, a declaration charging that the defendant has not paid the debt to the obligee, or to the plaintiff, without averring also that he did not pay it to the other assignees in his life time, is bad on general demurrer. *Nicholson v. Dixon's Heir*, pl. 1. p. 198.
6. See *Partnership*; and *Shields v. Oney*, pl. 1. p. 550.

# DECREE.

1. See *Equity*; and *Isaac v. Johnson*, pl. 1. p. 95.
2. It is no objection to a Decree that it is nominally in favour of one defendant against another, if it be substantially in favour of the complainant. *West v. Belches*, pl. 4. p. 187.
3. See *Devise*; and *Hundley v. Lyons*, pl. 4. p. 342.
4. An attachment ought not to be awarded against a party for refusing obedience to a Decree, which as yet remains general and uncertain, and the extent of which, as it relates to him, he cannot ascertain without applying to the Court for a farther Decree. *Birchell and others v. Bolling*, pl. 2. p. 442.
5. A Decree ought not to be reversed, for uncertainty in matters, as to which it is only interlocutory, and may be perfected by application to the Court. *Ibid.* pl. 3.
6. See *Legacies*; and *Matthens Ex'or. of Garnett v. Noel*, pl. 2. p. 460.
7. The Clerk's stating in the transcript of the Record, that certain answers which are filed, and copied in such transcript, were not noticed by the Court, is not to be relied upon by the Appellate Court, if the contrary may be inferred from the Decree itself. *Pickett and Wife v. Chilton*, pl. 2. p. 467.
8. If the caption of the Decree names, as defendants to the cause, certain persons whose answers are filed; and the Decree states that the cause was heard upon the bill, answers and exhibits; it may be inferred that the answers of those persons were noticed by the Court. *Ibid.* pl. 3.
9. It is not sufficient ground for reversing an interlocutory Decree, that no day was given to an infant defendant to shew cause against it after he should come of age; because such omission may be corrected in the final Decree. *Ibid.* pl. 5.

# DEED.

1. Although, in the case of an absolute Deed of slaves, where the grantor remains in possession after the execution and recording of the same, such Deed is to be regarded as fraudulent and void as to creditors and subsequent purchasers, yet the same is obligatory, and cannot be impeached, as between the grantor and grantee, and their representatives. *Thomas v. Soper*, pl. 1. p. 28.
2. A wife has not such an interest in that portion of the personal estate of her husband, to which she may be entitled in the event of his dying intestate, or leaving a Will which she may renounce, as that an absolute and irrevocable, though merely voluntary, Deed thereof, executed by him to his children by a former marriage, can be considered a fraud on her rights, or be set aside at her instance. *Lightfoot's Ex'ors. and others v. Colgin and Wife*, pl. 1 p. 42.
3. A Deed of marriage settlement executed before and recorded after the marriage, but within the time allowed by law, is conclusive against the creditors of the husband for debts contracted by him before the marriage. And this although such Deed was recorded upon the acknowledgment of the parties, without any privy examination of the wife. *Scott and Wife and others v. Gibbon & Co. and others*, pl. 1. p. 86.
4. If plaintiffs in equity charge in their bill that a Deed of marriage settlement, under which they claim was executed before the marriage, though recorded afterwards; it being also expressed, in the recital of the Deed, that the same is made in contemplation of a marriage shortly intended to be solemnized, &c.; and that allegation be not denied or noticed in the answer; it must be considered as admitted to be true without farther proof. *Ibid.* pl. 2. p. 86.
5. A Deed of Bargain and Sale, admitted to record, on the acknowledgment of the bargainor in Court, without any actual delivery thereof to the bargainee, was determined to be good in law as a Deed delivered; the bargainee having entered upon the land immediately after the purchase; having paid a part of the purchase money; retained possession according to the bargain; and, upon being informed of the Deed, approved thereof, and claimed title to the land thereby intended to be conveyed. *Commonwealth v. Selden and Sedden*, pl. 2. p. 160.

6. The finding of an Inquest of Echeat in favour of the Commonwealth will not take away the title of a purchaser claiming by a Deed of Bargain and Sale executed and recorded before the Inquest was sealed, though without the knowledge of the bargainee until afterwards, *Ibid* pl 3
  7. *Quære*, whether an execution can legally be levied on property, the possession of which has passed from the debtor, and remained in a third person for more than five years, in pursuance of a Deed said to be fraudulent, but regularly recorded, and importing on its face to be for a valuable consideration: before such Deed has been impeached and convicted of fraud by the decree of a Court of competent jurisdiction? *Lawrence v. Swann & others*, pl 1 p 332
  8. See *Linds*; and *Huntley v. Lyons*, pl. 2. and 3 p 342.
  9. See *Domer*; and *Moore v. Gilliam*, pl. 2. p. 346.
  10. See *Agent*; and *Travis v. Claiborne*, pl. 1. p. 435
- dence, and also the land in controversy, be in a different district. *Hughes v. Hall*, pl. 1 p. 431.
3. If the caption of the decree names as defendants to the cause, certain persons whose answers are filed; and the decree states that the cause was heard upon the bill, answers and exhibits; it may be inferred that the answers of those persons were noticed by the Court. *Pickett and Wife, v. Chilton*, pl. 3. p. 467
  4. See *Citizens*; and *Williams v. Price*, pl. 1. and 2. p. 507.
  5. If, by direction of the plaintiff, the writ be served on one only of two partners in trade, when the declaration shews that the plaintiff knew the names of both, and he get a verdict, upon the plea of *non assumpsit*, pleaded by the partner, on whom the writ was served; judgment ought to be arrested. *Shields v. Oney*, pl. 1. p. 550.

## DELIVERY OF DEEDS.

1. A Deed of Bargain and Sale, admitted to record on the acknowledgment of the bargainor in Court, without any actual delivery thereof to the bargainee, was determined to be good in law as a Deed delivered; the bargainee having entered upon the land immediately after the purchase; having paid a part of the purchase money; retained possession according to the bargain; and, upon being informed of the Deed, approved thereof, and claimed title to the land thereby intended to be conveyed. *Commonwealth v. Selden and Seddon*, pl. 2. p. 117.

## DELIVERY (OF GOODS SOLD.)

1. See *Assumpsit*; and *Jones v. Stevenson*, pl. 1. p. 1.
2. See *Factor*; and *Howatt & Co. v. Davis and Chalmers*, pl. 1. 2. p. 34.

## DEMURRER.

1. *Quære*, whether it is competent to the plaintiff, in any action other than *Replevin*, to tender an issue in fact by a Replication, and an issue in law by a demurrer to the same plea? *Jones v. Stevenson*, pl. 3. p. 1.
2. Whenever there is an issue in fact, and also a demurrer, the demurrer ought first regularly to be decided; but an irregularity in this respect is not sufficient to reverse a Judgment to which there is no other objection. *Ibid* pl. 4 p. 1.

## DEMURRER TO EVIDENCE.

## DEED OF TRUST.

1. See *Equity*; and *Taylor v. Picklin & others*, pl. 1. 2. 3. p. 25
2. See *Trust*; (*Deed of*), and *Williamson v. Gordon's Ex'ors*, pl. 1. 257
3. If it appear from the Record in Ejectment that the defendant or his testator had adverse possession of the land at the time when a Deed of Trust under which the plaintiff claims was executed, judgment ought to be rendered for the defendant, although the nature of his title does not appear. *Bream v. Cooper's A'irs*, pl. 2 p. 7.
4. A stipulation, in a Bond or Deed of Trust, that, upon the debtor's failing at any time to pay the annual interest, the principal sum (which otherwise would not be payable until a distant day) shall be considered due, is in the nature of a penalty, against which it is in the province of a Court of Equity to relieve. *Mayn v. Judah*, pl. 1 p. 495
5. In such case, the payment or tender of the interest, at any time before the sale under the Deed of Trust, authorizes the debtor to call upon the Court of Chancery to prevent the sale. And by virtue of the Act of Assembly concerning executions, passed Nov. 25. 1314, the debtor was authorized to substitute bond and security in lieu of payment. *Ibid* pl. 2

## DEFENDANTS.

1. See *Decree*; and *West v. Belches*, pl. 4. p. 187.
2. The several Superior Courts of Chancery have jurisdiction in cases where their process is served upon the defendant, within their respective districts; though his place of resi-

1. If the case be clear against the party tendering a demurrer to evidence, the Court may refuse to compel the other party to join. *Dunbar v. Beale*, pl. 1. p. 24.

2. In assumpsit, if there be several counts in the declaration, the defendant should be charged as having "failed to pay the several sums of money aforesaid, and every part thereof." If this be not done, but the breach charged at the end of the last count be, that "he hath not paid the said sum of money;" and it appear, upon a demurrer to evidence, that all the evidence adduced by the plaintiff applies only to the first count, Judgment ought to be given for the defendant. *Ellis v. Turner's adm'rs.* pl. 1. p. 196.
3. Where the extent of the plaintiff's right under a covenant depends, in part, upon extrinsic testimony; the Court ought not to instruct the Jury "that if, upon the said evidence, they shall be of opinion that certain facts are established, then the defendant has broken his covenant, as charged in the declaration;" for it is not competent to the Court to say whether such facts are sufficient, or not, to warrant such conclusion, unless the sufficiency thereof had been duly submitted to its Judgment by a demurrer to the evidence. *Holkingworth v. Dunbar*, pl. 1. p. 190.

#### DEPOSITIONS.

1. Depositions taken in a suit to perpetuate testimony are not to be read as evidence in a subsequent suit, unless it appear that the witnesses are dead, or otherwise out of the power of the Court. *Lawrence v. Snann and others*, pl. 2. p. 332.

#### DESCRIPTION.

1. An omission to insert the name of the County, in which the land lies, is not sufficient to vitiate a Patent; the place being described with reasonable certainty. *McClem v. Tomlinson*, pl. 2. p. 230.

#### DETINUE.

1. After a *Distringas* upon a Judgment in Detinue has been returned executed, but without satisfaction; if the Court on the plaintiff's motion direct the *Distringas* to be superseded, so far as it related to the specific property, and to be executed as to the alternative value, such order is not erroneous; but, it seems, the plaintiff may have a new *Distringas*; to be executed as to such value. *Garland v. Bugg*, pl. 1. p. 166.
2. It is necessary to state the reasons of such order on its face, because it will be presumed to be correct unless the contrary appears. *Ibid.* pl. 2.
3. After the *Distringas* upon a Judgment in Detinue has been executed without satisfaction, superseded as to the specific property and directed to be executed as to the alternative value; if it appear to the Court that, in consequence of the defendant's persisting in withholding the specific property, the

plaintiff cannot get it by the *Distringas*; a *ca. sa. or fi. fa.* may be directed to be issued for the alternative value. *Ibid.* pl. 3.

4. Notice of a motion to supersede a *Distringas*, or for a *ca. sa. or fi. fa.* in lieu thereof, need not be given by the plaintiff to the defendant. *Ibid.* pl. 4.
1. It seems that, according to the common Law, still in force in Virginia, the plaintiff in Detinue is not entitled to the issues of the defendant's land, or other property, received by the Sheriff upon the *Distringas*. *Ibid.* pl. 5.

#### DEVASTAVIT.

1. See *Executors and administrators*; and *Sampson v. Payne's Ex'or. and Legatees*, pl. 1. p. 178.

#### DEVISES.

1. See *Escheats*; and the *Commonwealth v. Martin's Ex'ors. and Devisees*, pl. 1. p. 117.
2. See *Escheats*; and the *Commonwealth v. Selden and Seddon*, pl. 1. p. 160.
3. A Testator after devising certain lands and other property to his wife, during her life, directed, "that she should be furnished during her life, out of his whole estate, with whatever provision and necessities of every kind she might have occasion for, to support herself and family in the same manner he had always lived, or in any other manner she might think proper." *Quere*, whether, under this devise, she had not a life interest in certain lands, devised to one of his sons, in general terms, without specifying when that son was to be put into possession & a right to convert the whole profits thereof to the support of herself and the children during her life? *Bolling v. Bolling and others*, pl. 1. p. 334.
4. A Devisee is in general bound to take notice of the contents of the Will under which he received, when of full age, certain lands and other property from the Executors; such Will having then been proved and recorded. *Ibid.* pl. 2.
5. On a Bill for specific performance exhibited by the devisee of the purchaser, the Court, in decreeing the conveyance, ought to reserve to the vendor a lien on the land, to secure the payment of the purchase money. *Hundley v. Lyons*, pl. 4. p. 342.
6. See *Children*; and *Merryman v. Merryman and others*, pl. 1. and 2. p. 440.
7. See *Limitation*; and *Allen v. Parkham and others*, pl. 1. and 2. p. 457.

#### DISABILITY.

1. Under what circumstances, a purchaser, having his election to restore the property, is not disabled, in Equity, from availing himself of such right, by his having made a

lease thereof. *Williams v. Price*, pl. 12. p. 507.

### DISCOUNT.

1. See *Set Off*; and *Ritchie & Wales v. Moore*, pl. 3. and 4. p. 338.

### DISTRESS.

1. Interest on rents in arrear ought not to be allowed, the circumstances being that there always were effects on the premises liable to distress, sufficient to have satisfied the rents, which were not paid though demanded by the landlord. *Dow v. Adams's adm'rs.* pl. 3. p. 21.

### DISTRIBUTION.

1. See *Husband and wife*; and *Picket & Wife v. Chilton*, pl. 1. p. 467.

### DISTRICT.

1. See *Defendant*; and *Hughes v. Hall*, pl. 1. p. 431.

### DISTRINGAS.

1. After a *Distringas* upon a Judgment in Detinue has been returned executed, but *without satisfaction*; if the Court, on the plaintiff's motion direct the *Distringas* to be superseded, so far as it related to the specific property, and to be executed as to the alternative value; such order is not erroneous; but, it seems, the plaintiff may have a *new distringas* to be executed as to such value. *Garland v. Bugg*, pl. 1. p. 166.
2. It is not necessary to state the reasons of such order on its face; because it will be presumed to be correct unless the contrary appears. *Ibid.* pl. 2.
3. After the *Distringas* upon a Judgment in Detinue has been executed without satisfaction, superseded as to the specific property, and directed to be executed as to the alternative value; if it appear to the Court that, in consequence of the defendant's persisting in withholding the specific property, the plaintiff cannot get it by the *Distringas*, a *ca. sa.* or *fi. fa.* may be directed to be issued for the alternative value. *Ibid.* pl. 3.
4. Notice of a motion to supersede a *Distringas*, or for a *ca. sa.* or *fi. fa.* in lieu thereof, need not be given by the plaintiff to the defendant. *Ibid.* pl. 4.
5. It seems, that, according to the common Law, still in force in Virginia, the plaintiff in Detinue is not entitled to the issues of the defendant's land, or other property, received by the Sheriff upon the *Distringas*. *Ibid.* pl. 5.

### DOWER.

1. A plaintiff in ejectment may recover against a widow holding possession of the land, (of which her husband died seized,) and having a right of dower, if it do not appear that the land in controversy was assigned her as her dower, or as part thereof, or was attached to the mansion house of her husband at the time of his death. *Moore v. Gilliam*, pl. 1. p. 346.
2. Where a deed is made to the purchaser of land in fee simple, and, on the same day, he, without being joined by his wife, executes a Deed of Trust, to secure the payment of the purchase money; to raise which, the land is afterwards sold; *Quere*, whether, if she survive him, she be entitled to any right of dower in such land? *Ibid.* pl. 2.

### E

### EJECTMENT.

1. See *Possession*; and *Broom v. Cooper's Heirs*, pl. 1. p. 7.
2. If it appear from the record in ejectment, that the defendant, or his Testator, had *adversus* possession of the land, at the time when a Deed of Trust, under which the plaintiff claims, was executed, judgment ought to be rendered for the defendant, although the nature of his title does not appear. *Ibid.* pl. 2.
3. A plaintiff in ejectment may recover against a widow holding possession of the land, (of which her husband died seized,) having a right of dower, if it do not appear that the land in controversy was assigned her as her dower, or as part thereof, or was attached to the mansion house of her husband at the time of his death. *Moore v. Gilliam*, pl. 1. p. 346.
4. See *Evidence*; and *Ibid.* pl. 3.
5. If it be proved, on a trial in ejectment, that the father of the lessor of the plaintiff, who devised the land to him, was in possession thereof many years before and until his death; and that the lessor of the plaintiff afterwards conveyed it to a person, who was in possession at the time of his death; the Jury may presume that the lessor of the plaintiff was in possession from the death of his father to the date of such conveyance, if it be not proved that some other person in the mean time had the possession. *Ibid.* pl. 4.
6. In ejectment, if it appear from the evidence that the land in controversy was *vacant*, when the defendant came to the possession of it, peaceably and quietly, without any privity between him and the lessors of the plaintiff, or those under whom they claim;

the plaintiff cannot recover upon the ground of the prior possession of the lessors, without proving twenty years uninterrupted adverse possession on their part, or on the part of those under whom they claim, or shewing a right to the possession, by the death and seisin, in the manner prescribed by the Act of Assembly, of some person under whom they claim. *Moody v. M'Kim*, pl. 1. p. 374.

### ELECTION.

1. Where a purchaser, having his election to restore certain articles of personal property, makes an offer to do so, which the vendor refuses to accept, the purchaser is not thereafter responsible for any waste or damage the property may sustain without his wilful misconduct. *Williams v. Price*, pl. 11. p. 507.
2. Under what circumstances, a purchaser, having his election to restore the property, is not disabled, in equity, from availing himself of such right, by his having made a lease thereof. *Ibid.* pl. 12.

### EMPLOYER.

1. See *Overseer*; and *Harris v. Nicholas*, pl. 4. and 5. p. 483.

### EQUITY.

1. A man indebted by Bond, executed a conveyance of all his property in trust, for payment of his just debts in the first place; for his own support during life in the second; and, afterwards, for the benefit of his wife, &c. He died, without any will or property acquired after the date of such conveyance; and no person administered on his estate. It was held, that an assignee of the Bond was not restricted to his remedy at law, against the assignor, but without bringing any action at law, might obtain relief in equity by a decree for a sale of the property in the hands of the trustee. *Taylor v. Ficklin and others*, pl. 1. p. 25.
2. In such case, if the fund in the possession of the trustee prove insufficient, the plaintiff in equity may recover the balance of his claim from a debtor of the obligor; and, in default of both these funds, in whole or in part, he may proceed against the assignor. *Ibid.* pl. 2.
3. And it seems, that, all the persons concerned being made parties, the Court may do complete justice in one suit, and make a full end of the whole controversy. *Ibid.* pl. 3.
4. A purchaser of land, suing for breach of a contract to make a good title, may with propriety come into a Court of Equity for pecuniary compensation, instead of proceeding at law in the first instance; if the vendor

has conveyed away his property in trust, whereby there might be a difficulty in obtaining satisfaction of his judgment when recovered; the vendor, or his lawful representative, together with the trustees and cestuys que trusts, being made defendants to the bill. *Sims's Administrator v. Lewis's Executor and others*, pl. 1. p. 29.

5. In such case, the proceeding in equity is proper, also because it avoids circuity of action, and the Court has the power of directing an issue to try by a Jury the justice of the plaintiff's claim. *Ibid.* pl. 2.
6. Where a plaintiff in equity sues to take advantage of a contract found to be fraudulent, he is not to be sustained even to recover back money paid on such contract, but ought to be left to whatever remedy he may have at law. *Ibid.* pl. 3.
7. See *Case Agreed*, No. 1; and *Royall's Administrators v. Royall's Administrator*, pl. 1. p. 82.
8. In that case, on a Bill in Equity, filed in favour of the administrators of the son, the judgment was perpetually enjoined; on the ground, that they, as representing him, were entitled to the slaves; and, being in possession, should not be compelled to relinquish that possession, and afterwards be put to the circuity of another action to recover them back. *Ibid.* pl. 2.
9. If plaintiffs in equity charge in their bill that a deed of marriage settlement, under which they claim, was executed before the marriage, though recorded afterwards; it being, also, expressed in the recital of the Deed, that the same is made in contemplation of a marriage, "shortly intended to be solemnized," &c.; and that allegation be not denied or noticed in the answer; it must be considered as admitted to be true, without farther proof. *Scott and Wife v. Gibbon and Co.*, pl. 2. p. 88.
10. Relief given in equity, in a pauper's suit for freedom, by awarding a new trial at law, and (a verdict being certified,) decreeing for the plaintiff; upon a bill stating that, in the previous proceedings, he had not been permitted to obtain his testimony; and on proof now produced in support of his right; notwithstanding the defendant pleaded, in bar to such relief, a former verdict and judgment, by which the plaintiff was declared to be a slave, and a decree of another Court of Chancery, dismissing a similar bill exhibited on his behalf; from which judgment and decree he had not appealed. *Isaac v. Johnson*, p. 95.
11. A Bond to stay execution on a judgment was assigned for value received; without notice to the assignee of any equity against it; and after dissolution of an injunction to the judgment. The security in said Bond, who was also attorney in fact for the principal

- obligor, paid it off, without execution, and without any particular instruction to do so: after which, the chancellor re-instated the injunction. It was held that such payment by the attorney in fact was a waiver of the equity in behalf of the principal, who, therefore, notwithstanding the re-instatement of the injunction, was not entitled to recover back the money paid. *Medley v. Jones*, pl. 1. p. 98.
12. See *Hire*; *Ibid.* pl. 2. p. 98.
  13. If a *fieri facias* against the goods of a Testator be levied on slaves, which, by his Will, were specifically bequeathed, and after his death, were allotted to the legatee by the executor, who thereupon held them, and hired them out as guardian for such legatee; a Court of Equity ought by injunction, to stop the sale, until an account of the assets remaining unadministered shall be taken, and, upon such account, to decree that the creditor shall be satisfied out of those assets; or (if there be a deficiency) out of the residue of the estate of which the Testator died possessed; having regard to the rights of the several legatees under the will. *Scott and Wife v. Halliday and Hinton*, pl. 1. p. 103.
  14. See *Partition*, No. 2. 3; and *Carter's Executor v. Carter and others*, pl. 2. and 3. p. 108.
  15. See *Execution*; and *Sampson v. Bryce*, pl. 2. p. 173.
  16. A creditor having obtained a judgment against an executor as such, and sued out a *f. fa. de bonis testatoris*, which proved ineffectual, may either resort to his action at law to establish a *devastavit*, or file a bill in equity against the executor and legatees, for an account of assets, and proportional contribution to pay the debt. *Sampson v. Payne's Executor and Legatees*, pl. 1. p. 176.
  17. In such case, if there be a dispute between the executor and legatees, whether, under the circumstances, he ought not to pay the debt without any contribution from them; and if some of them be not made parties; the Court may with propriety dismiss the bill as to the legatees; but if it appear that the executor has delivered over to them property of the Testator, which would have been sufficient to pay the debt, he ought to be decreed to pay it *de bonis propriis*, and left to his remedy against them. *Ibid.* p. 2.
  18. A purchase by an executor or administrator of any part of the estate of his Testator, or intestate, when other persons were deterred from bidding in consequence of doubts concerning the title suggested by himself, whereby he obtained the property for less than its value, ought to be annulled by a Court of Equity. *Hudson and others v. Hudson's Administrator*, pl. 3. p. 180.
  19. A Court of Equity has jurisdiction to decree the repayment of money paid by mistake; notwithstanding the plaintiff's remedy by *assumpsit* for money had and received. *Wilkins v. Woodfin Administrator of Pearce*, pl. 1. p. 185.
  20. An evasive answer, (though not excepted to as such) outweighed by the testimony of one witness and circumstances. *Ibid.* pl. 2.
  21. Where it appears that, at the time of entering into a contract for sale of a tract of land, there was a misunderstanding, between the parties, as to the identity of the land to which the contract related, a Court of Equity, in its discretion, ought not to interfere by decreeing a specific performance. *Graham v. Hendren*, pl. 1. p. 185.
  22. To prevent circuity of action, and attain the ends of natural justice, a Court of Equity will completely indemnify one of the sureties in a bond by means of a *lien* on the property of the principal obligor existing in favour of the other surety; notwithstanding he has himself relinquished a *lien*, on the same property, originally created for his indemnification. And, for this purpose, the Court will compel the creditor (all the parties interested being before it,) to resort to that property, in the first place, for satisfaction of his debt. *West v. Belcher*, pl. 3. p. 187.
  23. It is no objection to a decree that it is nominally in favour of one defendant against another, if it be substantially in favour of the complainant. *Ibid.* pl. 4.
  24. A Bill for relief against a writing purporting an acknowledgment of a gift of property by the complainant to the defendant on the ground of its having been obtained by fraud, presents a proper case for equitable jurisdiction, though a suit at law, founded upon such writing might be defeated without coming into equity. *Johnson v. Handley*, pl. 1. p. 219.
  25. When a commissioner is stating accounts between executors and the estate of their Testator, if one of them who had for collection the evidences of debts due the estate, which might have been collected by him, be dead; his representative cannot object to his estate's being charged with those debts, unless the means be furnished of charging the surviving executor therewith. *Carter's Executors v. Cutting and Wife*, pl. 1. p. 223.
  26. In such case, the private account of each executor with the Testator in his life time, and with his co-executor, and all other accounts that are necessary to make a just settlement of the matters in controversy, ought to be taken, if requested, though not specifically put in issue in the cause. *Id.* pl. 2.
  27. On a bill exhibited by the holder of a promissory note against the maker, and all

- the endorser; to avoid circuity of action, the Court of Equity may fix the debt on the person first responsible. *Chalmers, Jones and Co. v. M'Nurdo*, pl. 1. p. 252.
23. An agent, endorsing a note for the benefit of his principal, who assures him that he shall not be held responsible, ought not to be compelled to pay the money at the suit of a person, to whom the note is endorsed with notice of such equity; but the decree should be against the principal. And it seems, if the endorser had no such notice, yet if the principal be solvent, the decree ought still to be against him in the first place. *Ibid.* pl. 4.
29. Of two equitable incumbrances, be that hath the preferable right to call for the legal estate, is entitled to preference, though he hath not actually got it in, nor got an assignment, nor even possession of the deed conveying the outstanding legal title; and though his lien is of subsequent date to the other incumbrances. *Williamson v. Gordon's Executors*, pl. 4. p. 287.
30. A purchaser, having taken possession of the estate, is not entitled to relief in equity against a judgment for the purchase money, on the ground that the title of the vendor is not clearly shown to be good, but is bound, on his part, to prove it bad. *Grantland v. Wright Executor, &c.* pl. 1. p. 295.
31. A vendor of land, by executing a conveyance and taking Bond and security for the purchase money, discharges the land from his equitable lien; even while it continues the property of the purchaser. *Wilson and others v. Graham's Executor and Devises*, pl. 1. p. 297.
32. Under what circumstances, in a suit of equity for specific performance of an agreement for an exchange of lands, the Court may decree according to the prayer of the bill, without a reference to a commissioner of the plaintiff's title, though objected to by the defendant in his answer. *Storall v. London*, pl. 1. p. 299.
33. The most important circumstances in this case appear to have been that the title by which the lands of each party were held, was set forth in the written agreement; and that the defendant, after filing his answer, received a sum of money, agreed to be paid for the difference in value between the tracts to be exchanged. *Ibid.* pl. 2.
34. See *Assets*; and *Boyd and Swenson and others v. Stainback and others*, pl. 3. p. 305.
35. See *Answer*; and *Jackson's Assignees v. Cutright and Clark*, pl. 1. p. 308.
36. A written agreement for sale of the lands of a corporation, though not with the common seal affixed, may be enforced in equity. *Legrand v. Hampden Sidney College*, pl. 3. p. 324.
37. In a written agreement for sale of land it was described as a tract which had belonged to the Commonwealth, and by the Commonwealth had been given to the vendor, who stipulated to make compensation, if a better title than his should thereafter be established. The title of the vendor appearing to be such as described; on a bill in his behalf for specific performance, the purchaser was not allowed compensation for locating and obtaining a patent for part of the land as waste and unappropriated, but was decreed to release his claim under the patent, before the vendor should be compelled to make him a deed; and a stipulation, conforming to the agreement, was directed to be inserted in such deed. *Ibid.* pl. 4.
38. Depositions taken in a suit to perpetuate testimony are not to be read as evidence in a subsequent suit, unless it appear that the witnesses are dead, or otherwise out of the power of the Court. *Lawrence v. Swann and others*, pl. 2. p. 332.
39. A Court of Equity ought not to direct an account to be taken, after a great lapse of time, and after acts of acquiescence, by the party demanding it, in a construction of his rights, which, if correct, would render such account unnecessary. *Bolling v. Bolling and others*, pl. 3. p. 334.
40. See *Land*; and *Hundley v. Lyons*, pl. 3. p. 342.
41. See *Devise*; and *Ibid.* pl. 4.
42. See *Condition*; and *Graham v. Call Executor of Means*, pl. 1. p. 398.
43. In a suit brought against the vendee of a slave, if he refer the controversy to arbitration, without being authorised to do so by the vendor, (who had bought and sold the slave *bona fide*), and when he might have cast the plaintiff in the ordinary course of law; he has no remedy in equity against such vendor, in the event of his losing the slave by an award. *Dust v. Conrad and others*, pl. 1. p. 411.
44. A mortgage being attested by one witness only, and therefore defective, (see 1. R. C. ch. 90. § 1 and 4. p. 157;) yet, if the mortgagee has recovered upon it at law, a Court of Equity will not regard the defect. *Ibid.* pl. 2.
45. If the mortgagee of a slave recover him in detinue against a person claiming under a *bona fide* purchaser from the mortgagor; equity will consider such person as standing in the place of the mortgagor, and entitled to redeem the slave by paying the debt. *Ibid.* pl. 3.
46. It will also, at the same time, (to make an end of the controversy,) give him relief against the mortgagor, who sold the slave with warranty of the title. *Ibid.* pl. 4.
47. In such case, the right of the derivative purchaser to redeem the slave, and to relief against the mortgagor, who improperly sold him, is not affected by his having submitted to



- arbitration the suit brought against him by the mortgagee. *Ibid.* pl. 5.
48. It seems, that, where the purchase money for land which the vendor has conveyed with warranty, has not been fully paid; and the purchaser comes into equity for an abatement or discount, from the sum remaining due, on account of a loss by an eviction of part of the land; he should be allowed the value of the land lost, at the time of the purchase, and not at the time of the eviction. *Crenshaw v. Smith and Co.*, pl. 1. p. 415.
49. A Bill in Equity in behalf of persons, suing as "children" of a deceased residuary legatee for his share of the residuum, cannot be sustained: it should appear that the plaintiffs are the administrators, or other legal representatives, of such legatee. *Hays's Executor and others v. Hays and others*, pl. 1. p. 418.
50. A surety in a Bond, having paid to the creditor the amount of a Judgment against him thereupon, may file a Bill in Equity, (without having made a motion or brought any action at law) against the administrator and heirs of the principal obligor, for the purpose of establishing his demand; of having an account of the personal and real estates; and of being permitted to stand in the place of the obligee in the Bond, so as to be paid out of the real estate, in default of the personal. *Tinsley v. Oliver's Administrator and Heirs*, pl. 1. p. 419.
51. See *Assignment*; and *Southgate v. Taylor*, pl. 1. p. 420.
52. A sale of mortgaged land by Commissioners in Chancery, ought to be set aside, and another decreed, upon its appearing to the Court that the highest bidder at such sale had previously agreed with a purchaser from the mortgagor, that he would allow such purchaser to redeem the land, within a limited time, by repaying him his money with interest; and that, such agreement being known at the sale, other persons were induced to refrain from bidding, and consequently the land was struck off to him at a price inferior to its value. *Wood's Executor and Miller v. Hudson and others*, pl. 1. p. 423.
53. See *Mortgage*; and *Ibid.* pl. 2.
54. See *Account*; and *Foster v. Clarke*, pl. 1. p. 430.
55. See *Agreement*; and *Birchett and others v. Bolling*, pl. 1. p. 442.
56. An Attachment ought not to be awarded against a party for refusing obedience to a decree, which as yet remains general and uncertain, and the extent of which, as it relates to him, he cannot ascertain without applying to the Court for a farther decree. *Ibid.* pl. 2.
57. A decree ought not to be reversed for uncertainty, in matters, as to which it is only interlocutory, and may be perfected by application to the Court. *Ibid.* pl. 3.
58. See *Legacies*; and *Matthews Executor of Gernett v. Noel*, pl. 2. p. 460.
59. It is a sufficient ground of equity for a perpetual injunction to a Judgment, in Slander, that, at the time of speaking the defamatory words, and when the Judgment was obtained, the complainant in the bill, (who was defendant at law) was insane, or in a state of partial mental derangement on the subject to which these words related. *Horne v. Marshall's Administratrix*, pl. 1. p. 466.
60. See *Interest*; and *Mayo v. Judah*, pl. 1 and 2. p. 495.
61. Under what circumstances, a purchaser, having his election to restore the property, is not disabled, in equity, from availing himself of such right, by his having made a lease thereof. *Williams v. Price*, pl. 12. p. 507.

## ERROR.

1. See *Demurrer*; and *Jones v. Stevenson*, pl. 4. p. 1.
2. See *Declaration*; and *Dow v. Adams's administrators*, pl. 1. p. 2.
3. See *Jurisdiction*; and *Buster v. Ruffner*, pl. 1. and 2. p. 27.
4. See *Pleading*; and *Chichester v. Beggan*, pl. 1. p. 98.
5. See *Condition*; and *Green v. Bailey*, pl. 1. p. 246.
6. The Act of January 10th, 1815, on the subject of writs of *Habeas Corpus*, does not authorize the issuing of a Writ of Error by the Court of Appeals to a Judgment discharging from custody a person confined by sentence of a Court Martial for failing to pay a fine imposed on him for not appearing at the place of rendezvous, and not marching, in obedience to a requisition of militia; for in such case, there is no discharge by the Judgment, of a person from the service of the State or the United States. *Attorney General v. Fenton and Shepherd*, pl. 1. p. 282.
7. See *Equity*; and *Birchett and others v. Bolling*, pl. 3. p. 442.
8. See *Decree*; and *Pickett and Wife v. Chilton*, pl. 5. p. 467.

## ESCHEATS.

1. A Testator devised his real estate in Virginia to his Executors, to be sold by them, or the survivor of them, at such time and in such manner as they or the survivor of them should judge most advantageous; and gave and bequeathed the money arising from such sales, and the rents and profits of the said lands

which might accrue before the sales, to his sisters, who were aliens; subject nevertheless, to the payment of his just debts, and of certain legacies to his Executors. *Quare*, whether, under this Will, the title of the alien sisters was good against the Commonwealth claiming the money for which the lands were sold; the Testator having died without any lawful heir and his personal estate being sufficient to pay his debts? *The Commonwealth v. Martin's Executors and Devisees*, pl. 1. p. 117.

2. A Testator bequeathed to his brothers David and James, (who were aliens) "to be equally divided between them, the money arising from the sale of his land and other property, and from the debts due to him at his death; and, as they resided in Great Britain, it was his Will that his Executors make remittances to them in bills of exchange, or in any other mode as soon as they could." This was adjudged to be a good devise, so that a sale and conveyance by the Executors was effectual to the purchaser; and that the land did not escheat to the Commonwealth in consequence of the Testator's dying without heirs. *Commonwealth v. Selden & Seldon*, pl. 1. p. 160.
3. See *Deed*; and *Ibid.* pl. 3.

#### ESTATE TAIL.

1. See *Limitation*; and *Allen v. Parham and others*, pl. 2. p. 457.

#### ESTOPPEL.

1. See *Arbitration*; and *Ligon v. Ford*, pl. 1. p. 10.

#### EVICTIION.

1. It seems, that, where the purchase money for land which the vendor has conveyed with warranty, has not been fully paid; and the purchaser comes into equity for an abatement or discount, from the sum remaining due, on account of a loss by an eviction of part of the land; he should be allowed the value of the land lost, at the time of the purchase, and not at the time of the eviction. *Crenshaw v. Smith, & Co.*, pl. 1. p. 415.

#### EVIDENCE.

1. An action of *Crim. Con.* being referred to arbitration by rule of Court, if the arbitrators refuse to hear testimony offered by the defendant impeaching the credit of the plaintiff's witnesses, or touching the deportment of the plaintiff's wife before her alleged seduction, this is such misconduct as vitiates their award; and the Court ought not to decline hearing proof of such misconduct. *Ligon v. Ford*, pl. 2. p. 10.

2. Whether, in an action for words, circumstances of suspicion, not amounting to full justification, may be proven in mitigation of damages. *Chealwood v. Mayo*, p. 16.
3. What evidence is sufficient to establish an acknowledgment of, and promise to pay, a debt by account. *Dunbar v. Beale*, pl. 2. p. 24.
4. See *Excursion*; and *Carrington v. Anderson*, pl. 1. and 2. p. 82.
5. An evasive answer (though not excepted to as such) outweighed by the testimony of one witness and circumstances. *Wilkins v. Woodfin adm'r. of Pearce*, pl. 2. p. 183.
6. See *Covenant*; and *Hollingsworth v. Dunbar*, pl. 1. p. 190.
7. The breach of covenant charged in the declaration, being, that, during a specified period of time, the defendant deprived the plaintiff of the water necessary for his mill, by diverting it therefrom, and suffering it to be diverted by others; the plaintiff is not limited, in proving acts committed by the defendant or other persons, to the period stated in the declaration; but may prove previous acts, in consequence of which, the injury was sustained during that time. *Ibid.* pl. 2.
8. When a Commissioner is stating accounts between Executors and the estate of their Testator; if one of them, who had for collection the evidences of debts due the estate, which might have been collected by him, be dead; his representative cannot object to his estate's being charged with those debts, unless the means be furnished of charging the surviving Executor therewith. *Carter's Ex'or. v. Cutting and Wife*, pl. 1. p. 293.
9. See *Equity*; and *Grantland v. Wight Ex'or.* &c., pl. 1. p. 296.
10. Though private Acts of Assembly may be given in evidence, without being specially pleaded, they are not to be taken notice of, judicially, by the Court, as public Acts are, but must be exhibited as documents, if not admitted by consent of parties. *Legrand v. Hampden Sidney College*, pl. 1. p. 324.
11. Depositions taken in a suit to perpetuate testimony are not to be read as evidence in a subsequent suit, unless it appear that the witnesses are dead, or otherwise out of the power of the Court. *Lawrence v. Swann & others*, pl. 2. p. 332.
12. It seems, that the testimony of the editor of a newspaper, that he inserted therein, the requisite number of times, an advertisement, the purport of which he states on oath, is sufficient proof of such publication, on a trial in ejectment, without producing the advertisement itself. *Moore v. Gilliam*, pl. 2. p. 346.
13. If it be proved, on a trial in Ejectment, that the father of the lessor of the plaintiff, who devised the land to him was in possession

thereof many years before and until his death; [and that the lessor of the plaintiff afterwards conveyed it to a person who was in possession at the time of his death, the jury may presume that the lessor of the plaintiff was in possession from the death of his father to the date of such conveyance; if it be not proved that some other person in the mean time had the possession. *Ibid.* pl. 4.

14. See *Ejectment*; and *Moody v. McKim*, pl. 1. p. 374.

15. It is sufficient evidence, in support of a motion by a high sheriff against his deputy, to recover the amount of a Judgment rendered by a County Court against the former, as having been obtained for the default and misconduct of the latter, if it be proved, by the Record, that appearance bail, taken by the deputy sheriff, was accepted in the Clerk's office, and, at the ensuing quarterly Court, (without any decision by the Court as to the sufficiency of the bail,) an office judgment against the defendant and sheriff was set aside, payment being pleaded in the name of the high sheriff, after which a final Judgment was rendered by *non sum informatus*; and, by the *parol testimony of the counsel*, that he set aside the office judgment at the instance of the deputy sheriff, and had no communication with the high sheriff during the pendency of the suit. *Stowers Adm'r. of Bragg v. Smith's Ex'x.*, pl. 1. p. 401.

16. Under the Act of 1812, ch. 2. § 18, 19, 20., a note negotiable at bank may be given in evidence, if duly stamped before it became payable, though not so stamped when it was executed. *Hannon & High v. Bette*, pl. 1. p. 490.

17. The right of freedom, *prima facie* acquired by a slave imported into this State, subsequent to the year 1786, could only be obviated by evidence adduced to show, or by circumstances authorising a presumption, that the oath required by law had been taken by the importer. *Garnett v. Sam and Phillis*, pl. 2. p. 542.

18. In the trial of a suit for freedom, declarations of a person, who imported the plaintiffs, are not evidence in their favour; if it do not appear that those declarations were made during the time when he claimed them as his slaves, and that the defendant claims under him. *Ibid.* pl. 3.

19. *Quere*, whether, in an action of slander between A. and B., the right of C. to freedom can be collaterally investigated. *Hook's Adm'r. v. Hancock*, pl. 2. p. 548.

#### EXCEPTIONS.

1. See *Account*; and *Forster v. Clarke*, pl. 1. p. 430.

#### EXCEPTIONS (BILL OF.)

1. If it be stated in a Bill of Exceptions, upon a trial in Ejectment, that the Testator of the

defendant departed this life in possession of the land, which possession he had held *ad-vorces* to the lessor of the plaintiff, for a specified time, it must be understood that such possession was adverse to those under whom the lessor of the plaintiff claimed; especially if it appear, from another Bill of Exceptions, in the same trial, that the title of the lessor of the plaintiff did not commence until after the death of the said Testator. *Brown v. Cooper's heirs*, pl. 1. p. 7.

2. See *Bill of Exceptions*; and *Garnett v. Sam and Phillis*, pl. 1. p. 542.

#### EXCHANGE.

1. Under what circumstances, in a suit in Equity, for specific performance of an agreement for an exchange of lands, the Court may decree according to the prayer of the Bill, without a reference to a Commissioner of the plaintiff's title, though objected to by the defendant in his answer. *Stovell v. London*, pl. 1. p. 280.
2. The most important circumstances in this case appear to have been that the *titles* by which the lands of each party were held, was set forth in the written agreement; and that the defendant, after filing his answer, received a sum of money agreed to be paid for the difference in value between the tracts to be exchanged. *Ibid.* pl. 2.

#### EXECUTION.

1. By virtue of the Act of Assembly concerning Sheriffs passed the 8th of February, 1806, any person claiming the property sold under an Execution may prosecute an action of debt on the Bond of Indemnity, in the name of the Sheriff, or other officer, to whom it was taken, without proving that any damage has been sustained by such officer. *Carryington v. Anderson*, pl. 1. p. 32.
2. The Deputy Sheriff, who sold the property under the Execution, is not a competent witness, in an action in the name of the High Sheriff upon the Bond of Indemnity, to prove that, in fact, the property was that of the person against whom the Execution was issued. *Ibid.* pl. 2.
3. See *Equity*; and *Scott and Wife v. Halliday and Hinton*, pl. 1. p. 103.
4. After a *Distingas* upon a Judgment in Debt has been returned executed, but without satisfaction; if the Court on the plaintiff's motion direct the *distingas* to be superseded, so far as it related to the specific property and to be executed as to the alternative value; such order is not erroneous; but it seems the plaintiff may have a new *Distingas*, to be executed as to such value. *Garland v. Bugg*, pl. 1. p. 166.
5. It is not necessary to state the reasons of such order on its face; because it will be presumed to be correct, unless the contrary appears. *Ibid.* pl. 2.

6. After the *Distringas* upon a Judgment in Detinue has been executed without satisfaction, superseded as to the specific property, and directed to be executed as to the alternative value; if it appear to the Court that, in consequence of the defendant's persisting in withholding the specific property, the plaintiff cannot get it by the *Distringas*, a *ca. sa.* or *fi. fa.* may be directed to be issued for the alternative value. *Ibid.* pl. 3.
7. Notice of a motion to supersede a *Distringas*, or for a *ca. sa.* or *fi. fa.* in lieu thereof, need not be given by the plaintiff to the defendant. *Ibid.* pl. 4.
8. A *fi. fa.*, against the estate of a testator, cannot lawfully be levied on slaves which, being specifically bequeathed, are in possession of the legatee as their property, either by actual delivery from the Executor or by his permission. *Sampson v. Bryce*, pl. 1. p. 175.
9. In such case, a Court of Equity may award an Injunction to prevent the sale of the property. *Ibid.* pl. 2.
10. An Injunction of a Court of Chancery, inhibiting the defendant and all other persons, from selling certain slaves until the farther order of the Court, is conclusive, while in force, to prevent their being lawfully sold to satisfy an Execution against him, even in favor of a person not a party to the suit in Chancery. *West v. Belches*, pl. 2. p. 187.
11. Under the Act of Assembly concerning Sheriffs, (Rev'd. Code, 2d Vol. p. 160,) the Sheriff having received the Bond of Indemnity, is bound to sell the property taken in execution, whether it belongs to the debtor or not. *Stons v. Pointer*, pl. 1. p. 287.
12. In such a case, there is no implied warranty by the Sheriff of the title to the property sold, nor implied promise to refund the purchase money, if the buyer be evicted. *Ibid.* pl. 2.
13. *Quære*, whether an Execution can legally be levied on property, the possession of which has passed from the debtor, and remained in a third person, for more than five years, in pursuance of a Deed said to be fraudulent, but regularly recorded, and importing on its face to be for a valuable consideration, before such Deed has been impeached and convicted of fraud by the decree of a Court of competent jurisdiction? *Lawrence v. Swann and others*, pl. 1. p. 322.
- fi. fa. de bonis testatoris*, which proved ineffectual, may either resort to his action at law to establish a *devastavit*, or file a Bill in Equity against the Executor and legatees, for an account of assets and proportional contribution to pay the debt. *Sampson v. Payne's Ex'or. and Legatees*, pl. 1. p. 176.
5. In such case, if there be a dispute between the Executor and legatees, whether, under the circumstances, he ought not to pay the debt without any contribution from them, and if some of them be not made parties, the Court may with propriety dismiss the bill as to the legatees; but if it appear that the Executor has delivered over to them property of the testator which would have been sufficient to pay the debt, he ought to be decreed to pay it *de bonis propriis*, and left to his remedy against them. *Ibid.* pl. 2.
6. An administrator with the Will annexed having, with the consent of the widow, (who was tenant for life,) made certain additions, the utility and propriety of which were doubtful, and also sundry repairs to a barn on the land, it was decided that the expense of those additions should be allowed him against the widow only, and of the reasonable repairs against the widow and children generally. *Hudson and others v. Hudsons adm'r.* pl. 1. p. 180.
7. If an Executor or administrator sell the slaves of his testator or intestate by private contract for ready money, he ought to be charged therefore such sum as they would have sold for upon a reasonable credit, if the situation of the estate would admit of such credit, and, if not, such sum as they would have sold for, in cash at public auction. *Ibid.* pl. 2.
8. A purchase, by an Executor or administrator, of any part of the estate of his testator, or intestate, when other persons were deterred from bidding, in consequence of doubts concerning the title suggested by himself, whereby he obtained the property for less than its value, ought to be annulled by a Court of Equity. *Ibid.* pl. 3.
9. When a commissioner is stating accounts, between executors and the estate of their testator, if one of them, who had for collection the debts due the estate which might have been collected by him, be dead; his representative cannot object to his estate's being charged with those debts, unless the means be furnished of charging the surviving Executor therewith. *Carter's Ex'ors. v. Cutting and Wife*, pl. 1. p. 108.
10. In such case, the private account of each Executor with the testator in his life time, and with his Co-Executor, and all other accounts that are necessary to make a just settlement of the matters in controversy, ought to be taken, if requested; though not specifically put in issue in the cause. *Ibid.* pl. 2.

# EXECUTORS AND ADMINISTRATORS.

1. See *Equity*; and *Royal's adm'rs. v. Royal's adm'r.* pl. 1. p. 82.
2. See *Account*; and *Scott and Wife v. Halliday & Hinton*, pl. 1. p. 103.
3. See *Escheats*; and the *Commonwealth v. Seiden & Seddon*, pl. 1. p. 117.
4. A creditor having obtained a Judgment against an Executor as such, and sued out a

11. An Executor ought not to be allowed a credit for paying a debt of his testator, appearing on the face of the written instrument, intended to secure it, to have been for money won at unlawful gaming. *Ibid.* pl. 4.
12. Monies directed to be invested by Executors in Government sureties should be accounted for, as if invested, after a reasonable time for that purpose; but the Executors ought not to be charged with Interest during such reasonable time; nor with interest upon dividends of stock, if such dividends have not been actually received. *Ibid.* pl. 7.
13. Where an Executor is directed to invest money in stock he ought to have the investment made in his own name as Executor, in order that, if necessary, the stock may be readily converted into money to pay the debts of his testator. *Carter's Ex'ors. v. Culling and Wife*, pl. 8. p. 224.
14. Although, under peculiar circumstances an allowance may be made to Executors, in addition to the commissions given to Attorneys for collecting debts confided to them, such addition of commissions ought not, in general, to be allowed where the debtors reside in or near the neighbourhood of the Executors, who, consequently, might collect the monies themselves. *Ibid.* pl. 9.
15. An Executor selling the land of his testator by virtue of a power given by the Will, is not bound to convey with general warranty without an agreement to that effect; but only with special warranty, against himself and all persons claiming under him; notwithstanding a written agreement after the sale, that he would make "a good and indefeasible title," to the purchaser: for such agreement is to be understood in reference to the terms of the sale. *Grantland v. Wight Ex'or. &c.* pl. 2. p. 285.
16. See *Children*; and *Hay's Ex'ors. and others v. Hays and others*, pl. 1. p. 418.
17. A surety in a Bond, having paid to the creditor the amount of a Judgment against him thereupon, may file a Bill in Equity, (without having made or brought any action at law) against the administrator and heirs of the principal obligor; for the purpose of establishing his demands; of having an account of the personal and real estates, and of being permitted to stand in the place of the obligee in the bond, so as to be paid out of the real estate in default of the personal. *Tinsley v. Oliver's adm'r. and heirs*, pl. 1. p. 419.

## EXHIBITS.

1. Though private Acts of Assembly may be given in evidence without being specially pleaded, they are not to be taken notice of judicially, by the Court as public acts are, but must be exhibited as documents, if not admitted by consent of parties.. *Legrand v. Hampden Sidney College*, pl. 1. p. 344.

## F

## FACTOR.

1. In case of a sale of personal property not executed by delivery, but to be consummated by delivery at another place; although, in consequence of earnest paid, or otherwise, the property be so vested in the buyer that, on complying or offering to comply with the contract on his part, he may recover the same from the seller or his agent; yet, until delivery, and while the goods are (in legal phrase) in transitu, the seller may, on the buyer's becoming bankrupt, or being likely to be so, arrest the goods or order his agent to arrest them; which order, operating as an indemnity to the agent, in addition to that arising from his possession of the goods, will be his guarantee for refusing to deliver them; and, perhaps, under circumstances, the agent would also have a right to demand other security from his principal, which it would be incumbent on him forthwith to give, under pain of a right in the agent, to go on and execute the contract by a delivery. *Hewitt & Co. v. Davis & Chalmers*, pl. 1. p. 34.
2. If a factor or agent, having sold goods belonging to his principal, be ordered by him while they are yet in transitu, not to deliver them to the buyer, of whose solvency doubts are entertained; and he deliver them, notwithstanding such order, and without demanding any security for his indemnity, the principal is entitled to an action against him, in case the buyer should prove insolvent. *Ibid.* pl. 2. p. 34.
3. And such right of action is not waived or abandoned by expressions, used in letters from the principal after the delivery of the goods, seeming to import an agreement to look to the buyer for payment, and not to the factor; nor by the principal's permitting considerable time to elapse before he informs the factor, categorically, that he will look to him, and not to the buyer for satisfaction; provided such expressions, and such delay, on the part of the principal, may have been occasioned by the factor's failing to make a full and fair disclosure of all facts and circumstances necessary to enable the principal to decide upon the subject, and which it was the duty and in the power of the factor to have given. *Ibid.* pl. 3. p. 34.

## FATHER AND SON.

1. If a father make payments in part of a gaming debt of his son, and never reclaim them in his life time, but provide by his Will a fund for payment of the balance; they should not, after his death, be claimed of his son's estate, but considered as payments or advancements to the latter; as payments to the amount of any previous existing accounts of the son against the father; and, beyond that

amount, as *advancements* to the son. *Carter's Ex'ors. v. Cutting and Wife*, pl. 3. p. 223.

2. A father having undertaken, by written agreement, as surety, for the payment of a gaming debt of his son; and, afterwards, by his Will, (reciting that he had so become surety,) having devised to his son certain real estate charged with the payment of that debt; such charge is not a *condition precedent* binding the son or his representatives to pay it; but he and they shall hold the estate *discharged* thereof. *Ibid.* pl. 5.

### FEDERAL COURTS.

1. See *Citizens*; and *Williams v. Price*, pl. 1, 2 and 3. p. 507.

### FIRE (INSURANCE AGAINST.)

- \* 1. See *Mutual Assurance Society against Fire*; and *Greenhow Agent for the Mutual Assurance Society v. Buck*, pl. 1. p. 263.

### FORECLOSURE.

1. See *Assignment*; and *Southgate v. Taylor*, pl. 1. p. 20.

### FRAUDS.

1. Although, in the case of an absolute Deed of slaves, where the grantor remains in possession after the Execution and recording of the same, such Deed is to be regarded as fraudulent and void as to creditors and subsequent purchasers, yet the same is obligatory, and cannot be impeached, as between the grantor and grantee and their representatives. *Thomas v. Soper*, p. 28.
2. Where a plaintiff in Equity sues to take advantage of a contract found to be fraudulent, he is not to be sustained, even to recover back money paid on such contract, but ought to be left to whatever remedy he may have at law. *Sims's Adm'r. v. Lewis's Ex'or. &c.*, pl. 3. p. 29.
3. A wife has not such an interest in that portion of the personal estate of her husband, to which she may be entitled in the event of his dying intestate, or leaving a Will which she may renounce, as that an absolute and irrevocable, though merely voluntary, Deed thereof, executed by him to his children by a former marriage, can be considered a fraud on her rights, or be set aside at her instance. *Lightfoot's Ex'ors. & others v. Colgin & Wife*, pl. 1. p. 42.
4. A bill for relief, against a writing purporting an acknowledgment of a gift of property by the complainant to the defendant, on the ground of its having been obtained by fraud, presents a proper case for equitable jurisdiction, though a suit at law founded upon such writing might be defeated without coming into Equity. *Johnson v. Hendley*, pl. 1. p. 219.

5. See *Loan*; and *Boyd & Sneson & others v. Stainback & others*, pl. 1. p. 305.
6. See *Answer*; and *Jackson's Assignees v. Cutright & Clark*, pl. 1. and 2. p. 308.
7. It seems, that payment of the purchase money is not sufficient part performance of a verbal contract for land, to take it out of the Statute of Frauds. *Ibid.* pl. 3.
8. *Quare*, whether an Execution can legally be levied on property, the possession of which has passed from the debtor, and remained in a third person, for more than five years, in pursuance of a deed said to be fraudulent, but regularly recorded, and importing on its face to be for a valuable consideration; before such deed has been impeached and convicted of fraud by the decree of a Court of competent jurisdiction? *Lawrence v. Swann & others*, pl. 1. p. 332.
9. If a promissory note, negotiable at bank, be made and endorsed, for the purpose only of obtaining accommodation for the maker, and, being left by him with a second endorser to be lodged in the bank for discount, be fraudulently put into circulation by such second endorser, to raise money thereupon for his own use; a third endorser, knowing nothing of such fraud, may cause the note, (if lodged in the bank for collection, and not paid when due,) to be protested as to the maker and prior endorsers, *pay it himself*, and thereupon maintain his action against the maker and first endorser; notwithstanding no valuable consideration passed, or was contracted for, between him and the second endorser, but he made the endorsement merely from the motive of enabling such second endorser to get the note discounted at the bank. *Robertson & Co. v. Williams & Smith*, pl. 1. p. 381.

### FREEDOM.

1. Relief given in Equity, in a pauper's suit for freedom, by awarding a new trial at Law, and, (a verdict being certified) decreeing for the plaintiff: upon a bill stating, that, in the previous proceedings, he had not been permitted to obtain his testimony; and on proof now produced in support of his right; notwithstanding the defendant pleaded, in bar to such relief, a former verdict and judgment by which the plaintiff was declared to be a slave, and a decree of another Court of Chancery dismissing a similar bill exhibited on his behalf; from which judgment and decree he had not appealed. *Isaac v. Johnson*, pl. 1. p. 95.
2. If the case made by a Bill of Exceptions be, that the plaintiffs, suing for freedom, were brought into this State subsequent to the year 1788, and that the defendant asserts a claim to them on the ground that the oath prescribed by the 4th section of the Act of 1792, (1 B. C. ch. 103,) was duly taken by

him or those under whom he claims; the other grounds of claim authorized by the last clause of the same section, (*not being mentioned*), must be considered as *excluded*. *Garnett v. Sam & Phillis*, pl. 1. p. 542.

3. The right of freedom *prima facie* acquired by a slave imported into this State, subsequent to the year 1788, could only be obviated by evidence adduced to shew, or by circumstances authorizing a presumption, that the oath required by law had been taken by the importer. *Ibid.* pl. 2.
4. In the trial of a suit for freedom, declarations of a person who imported the plaintiff, are not evidence in their favour, if it do not appear that those declarations were made during the time when he claimed them as his slaves, and that the defendant claims under him. *Ibid.* pl. 3.
5. See *Justification*; and *Hook's Administrators v. Hancock*, pl. 1. p. 546.
6. *Quære*, whether, in an action of slander between A. and B., the right of C. to freedom can be collaterally investigated? *Ibid.* pl. 2.
7. In a suit for freedom, the validity of a Will, under which the plaintiff claims, ought not to be questioned; the same, (*or a copy thereof*, the original being destroyed), having been admitted to record, as and for the last Will of the Testator, by the proper Court, whose judgment remains unappealed from, and the validity of such Will not contested by bill in Equity. *Lemon v. Reynold's Adm'r. of Holmes*, pl. 1. p. 552.

#### FURNITURE.

1. What articles are *not* comprehended in a bequest of *stock, plantation utensils*, and household furniture. *Kendall's Ex'or. &c. v. Kendall, &c.*, pl. 2. p. 287.

#### G

#### GAMING DEBTS.

1. If a father make payments in part of a gaming debt of his son, and never reclaim them in his life time, but provide by his Will a fund for payment of the balance; they should not, after his death, be claimed of his son's estate, but considered as *payments* or *advancements* to the latter; as *payments*, to the amount of any previous existing accounts of the son against the father; and, beyond that amount, as *advancements* to the son. *Carters Ex'ors. v. Cutting and wife*, pl. 3. p. 223.
2. An Executor ought not to be allowed a credit for paying a debt of his testator, appearing, on the face of the written instrument intended to secure it, to have been for money won at unlawful gaming. *Ibid.* pl. 4.
3. A father having undertaken, by written agreement, as surety, for the payment of a

gaming debt of his son; and, afterwards, by his Will, (reciting that he had so become surety), having devised to his son certain real estate charged with the payment of that debt; such charge is *not a condition precedent*, binding the son or his representatives to pay; but he and they shall hold the estate discharged thereof. *Ibid.* pl. 5.

4. A testator's directing all his just debts to be paid, out of the sales of certain lands, does not authorize the payment of a gaming debt of his out of the proceeds of such sales. *Ibid.* pl. 6.

#### GIFT.

1. See *Fraud*; and *Johnson v. Hendley*, pl. 1. p. 219.

#### H

#### HABEAS CORPUS.

1. The Act of January 10th, 1815 on the subject of Writs of *Habeas Corpus* does not authorize the issuing of a Writ of Error by the Court of Appeals to a judgment discharging from custody a person confined by sentence of a Court Martial for failing to pay a fine imposed on him for *not appearing at the place of Rendezvous, and not marching*, in obedience to a Requisition of Militia; for in such case, there is no discharge, by the Judgment, of a person from the service of this State or of the United States. *Attorney General v. Fenton and Shepherd*, pl. 1. p. 232.

#### HEIRS.

1. See *Sureties*; and *Tinsley v. Oliver's adm'r. and heirs*, pl. 1. p. 419.
2. *W. A.*, by his last Will, devised that, "*in case he should die before his brother, R. A.*, all his estate both real and personal should descend to him and his heirs forever; but, in case his said brother should die without a lawful heir, it should then be equally divided between his brother, *W. A.*, and his nephew *S. A.*, to them and their heirs forever." *R. A.* having died in the life time of the devisor, and without issue, the limitation over could not take effect; but the estate descended to the heirs general of the devisor. *Allen v. Parham*, pl. 1. p. 457.

#### HIRE.

1. A person entitled to a remainder in fee, expectant upon a life estate, in slaves, taking them into his own possession to prevent the tenant for life from carrying them out of the State, is bound to account for and pay their hire or profits while he detains them; and is not entitled, upon the ground of the tenant's refusing to give bond and security for their production at the expiration of the life estate,

- to an Injunction, to stay proceedings upon a Judgment, against him, for such hire or profits. *Medley v. Jones*, pl. 2. p. 98.
2. A writing under seal being in these words; "for the hire of four negro fellows the present year who are to be returned well clothed on or before the 25th of December, I promise to pay &c.;" *quære*, whether such writing contains a covenant to return the negroes, as well as to pay the money? *Harris v. Nicholas*, pl. 1. p. 483.
  3. A Covenant, by a person hiring a slave, to return him at the end of the year, is not to be considered as a covenant to insure such return in the event of his death in the mean time; although it be occasioned by a cruel and excessive beating perpetrated by the Overseer under whose superintendence he was put. *Ibid.* pl. 2.
  4. *Quære*, whether an employer who continues in his service an Overseer noted for cruelty, may not be made liable, by an action upon the case, for the value of a hired negro whipped to death by such Overseer, though without any direction from him? *Ibid.* pl. 3.
  5. When a person, who bought a slave with lawful notice of a better title, is decreed to deliver him and pay profits; interest ought to be charged against him, upon the hires actually received by him from other persons, from the dates of his receipts, but not upon the profits of such slave while in his own possession without being hired, the same being unliquidated, and merely conjectural sums, and which he was in no default in not paying. *Baird v. Bland and others*, pl. 1. p. 492.
- the acknowledgment of the parties, without any privity examination of the wife. *Scott and Wife and others v. Gibbon & Co. and others*, pl. 1. p. 86.
3. Construction of a marriage settlement, by which the personal estate of the intended wife was conveyed to trustees for her use until the marriage; then, upon trust that the husband and Wife should enjoy the profits during the coverture; and, afterwards, that the trustees should assign, transfer and pay over all the said property (that might remain) to the Wife in case she survived the husband, but, if she died before him, then to such person or persons, as she should, notwithstanding her coverture, appoint by Deed or Will, "to the intent that the same might not be at the disposal of, or subject to the control, debts, forfeitures or engagements of the husband;" with a provision that, in the event of her surviving him, and claiming any part of his estate, by right of dower or otherwise, the trustees should hold for his benefit and that of his Executors, &c.; but without any provision for the event of his surviving her, and her failing to make any appointment. The Husband, having survived the Wife, who made no appointment, was entitled to the property as her administrator, and not compelled to make distribution to her children by a former husband. *Pickett & Wife v. Chilton*, pl. 1. p. 467.

I

# IMMATERIAL ISSUE.

## HOGS.

1. *Fattening hogs* are not comprehended in a bequest, to one of a testator's children, of the stock belonging to the place whereon he lived. *Kendall's Ex'or. &c. v. Kendall &c.* pl. 3. p. 272.

## HUSBAND AND WIFE.

1. A wife has not such an interest in that portion of the personal estate of her husband, to which she may be entitled in the event of his dying intestate, or leaving a Will which she may renounce, as that an absolute and irrevocable, though merely voluntary, Deed thereof, executed by him to his children by a former marriage, can be considered a fraud on her rights, or be set aside at her instance. *Lightfoot's Ex'ors. &c. v. Colgin & Wife*, pl. 1. p. 42.
2. A Deed of marriage settlement executed before and recorded after the marriage, but within the time required by law, is conclusive against the creditors of the husband for debts contracted by him before the marriage. And this although such Deed was recorded upon

1. In debt on a Bond, if the declaration describe it as a writing obligatory for a sum of money; and the defendant, without praying oyer of the Bond, plead payment, and also several other pleas, alleging performance of a condition, according to which the Bond was to be discharged, by the delivery of a certain quantity of iron; and, issue being joined thereupon, the parties go to trial; and it appears, by bills of exceptions, that the evidence before the Jury did not apply to the plea of payment, but to the other pleas only; a verdict for the defendant ought to be set aside, and a new trial awarded, with leave to him to take oyer of the condition of the Bond, and plead *de novo*; all his pleas, except that of payment, being irrelevant to the claim set out in the declaration, and, therefore, the issues joined upon them being immaterial. And this is the case, notwithstanding a copy of a Bond, corresponding with that described in the pleas, be inserted in the transcript of the record, and certified by the clerk to be the Bond on which the declaration was filed. *Beatty v. Smith and others*, p. 39.



## IMPORTATION OF SLAVES.

1. If the case made by a Bill of Exceptions be, that the plaintiffs, suing for freedom, were brought into this state subsequent to the year 1786; and that the defendant asserts a claim to them on the ground that the oath, prescribed by the fourth section of the Act of 1792, (1 R. C. ch. 103,) was duly taken by him or those under whom he claims; the other grounds of claim authorised by the last clause of the same section, (*not being mentioned*,) must be considered as *excluded*. *Garnett v. Sam and Phillis*, pl. 1. p. 642.
2. The right of freedom *prima facie* acquired by a slave imported into this state, subsequent to the year 1786, could only be obviated by evidence adduced to shew, or by circumstances authorizing a presumption, that the oath required by law had been taken by the importer. *Ibid.* pl. 2.
3. In the trial of a suit for freedom, declarations of a person who imported the *plaintiffs* are not evidence in their favour; if it do not appear that those declarations were made *during the time when he claimed them* as his slaves, and that the defendant claims under him. *Ibid.* pl. 3.

## INCUMBRANCE.

1. Of two *equitable* incumbrancers, he that hath the *preferable right to call for the legal estate* is entitled to preference; though he hath not actually got it in, nor got an assignment, nor even possession of the deed conveying the outstanding legal title; and though his *lien* is of subsequent date to the other incumbrance. *Williamson v. Gordon's Executor*, pl. 2. p. 257.

## INDEMNIFYING BOND.

1. By virtue of the Act of Assembly, concerning Sheriffs, passed the 8th of February, 1808, (Rev'd. Code, 2d vol. p. 160,) any person claiming the property sold under an execution, may prosecute an action of debt on the bond of indemnity, in the name of the Sheriff or other officer to whom it was taken, without proving that any damage has been sustained by such officer. *Carrington v. Anderson*, pl. 1. p. 32.
2. The Deputy Sheriff, who sold the property under the execution, is not a competent witness, in an action in the name of the High Sheriff upon the bond of indemnity, to prove that, in fact, the property was that of the person against whom the execution was issued. *Ibid.* pl. 2.
3. Under the Act of Assembly concerning Sheriffs, (Rev'd. Code, 2d vol. p. 160,) the Sheriff, having received the *bond of indemnity*, is bound to sell the property taken

in execution, whether it belongs to the debtor or not. *Stone v. Painter*, pl. 1. p. 287.

## INDEMNITY.

1. See *Bond*; and *West v. Belcher*, pl. 3. p. 187.

## INDORSERS.

1. On a Bill exhibited by the holder of a promissory note against the maker and all the indorsers; to avoid circuity of action, the Court of Equity may fix the debt on the person *first* responsible. *Chalmers, Jones and Co. v. M'Murdo*, pl. 1. p. 252.
2. The first indorser of a note in point of time is not of course first responsible. *Ibid.* pl. 2.
3. If the *payee* of a note write his name over that of a person, who indorsed it in *blank*, but refused to do so except upon the ground of the responsibility of the payee as *first indorser*; he thereby makes himself responsible, as such, in point of contract. *Ibid.* pl. 3.
4. An agent, indorsing a note for the benefit of his principal, who assures him that he shall not be held responsible, ought not to be compelled to pay the money at the suit of a person to whom the note is indorsed, with notice of such equity, but the decree should be against the *principal*. And it seems if the indorsee had no such notice, yet, if the *principal* be solvent, the decree ought still to be against him in the first place. *Ibid.* pl. 4.
5. If a promissory note, negotiable at bank, be made and indorsed, for the purpose only of obtaining accommodation for the maker, and, being left by him with a second endorser to be lodged in the bank for discount, be fraudulently put into circulation by such second indorser, to raise money thereupon for his own use; a third indorser, *knowing nothing of such fraud*, may cause the note, (if lodged in the bank for collection, and not paid when due,) to be protested as to the maker and prior indorsers, *pay it himself*, and thereupon maintain his action against the maker and first indorsers, notwithstanding no valuable consideration passed, or was contracted for, between him and the second indorser, but he made the indorsement merely from the motive of enabling such second indorser to get the note discounted at the bank. *Robertson and Co. v. Williams and Smith*, pl. 1. p. 381.
6. The holder of a bill of exchange with several indorsements in *blank*, has a right to strike out the names of the indorsers subsequent to the first, and to write over the name of the first indorser an assignment to himself; or the bill, without such assignment, will be considered as his property, by his having

it in his power to make it. *Ritchie and Wales v. Moore*, pl. 1. p. 888.

### INFANT.

1. It is not a sufficient ground for reversing an interlocutory decree, that no day was given to an infant defendant to shew cause against it after he should come of age; because such omission may be corrected in the final decree. *Pickett and Wife v. Chillon*, pl. 5. p. 467.

### INJUNCTION.

1. See *Equity*; and *Royall's Administrators v. Royall's Administrator*, pl. 2. p. 82.
2. See *Equity*; and *Medley v. Jones*, pl. 1. p. 98.
3. A person entitled to a remainder in fee expectant upon a life estate in slaves, taking them into his own possession to prevent the tenant for life from carrying them out of the state, is bound to account for and pay their hire or profits while he detains them; and is not entitled, upon the ground of the tenant's refusing to give bond and security for their production at the expiration of the life estate, to an injunction to stay proceedings upon a Judgment against him for such hire or profit. *Medley v. Jones*, pl. 2. p. 98.
4. If a *fieri facias* against the goods of a Testator be levied on slaves which by his will were specifically bequeathed, and after his death were allotted to the legatees by the executor, who thereupon held them, and hired them out, as *guardian* for such legatee, a Court of Equity ought by injunction to stop the sale, until an account of the assets unadministered shall be taken; and, upon such account, to decree, that the creditor shall be satisfied out of those assets; or, (if there be a deficiency,) out of the residue of the estate of which the Testator died possessed; having regard to the rights of the several legatees under the will. *Scott and Wife v. Halliday and Hinton*, pl. 1. p. 103.
5. See *Legacy*; and *Sampson v. Bryces*, pl. 2. p. 175.
6. An injunction of a Court of Chancery inhibiting the defendants, and all other persons, from selling certain slaves until the farther order of the Court, is conclusive, while in force, to prevent their being lawfully sold to satisfy an execution against him, even in favour of a person not a party to the suit in Chancery. *West v. Belcher*, pl. 2. p. 187.
7. It is not equitable that a defendant to a Bill of Injunction, (in whose favor a Judgment at law was rendered, for a sum of money which he had paid as security for the complainant) to except a Commissioner's state-

ment of the debits and credits between them, "to the time of the Judgment:" on the ground that, "from the circumstances of the case, and conduct of the parties, they considered their accounts as closed, and nothing due on either side;" and, yet, to select, and rely upon the Judgment, as an item in his favor, in exclusion of the other items in the account. *Foster v. Clarke*, pl. 1. p. 430.

8. It is a sufficient ground of Equity for a perpetual Injunction to a Judgment in Slander, that at the time of speaking the defamatory words, and when the Judgment was obtained, the complainant in the Bill (who was defendant at law) was insane, or in a state of partial mental derangement on the subject to which those words related. *Homer v. Marshall's adm'r.* pl. 1. p. 466.
9. See *Interest*; and *Mayo v. Judah*, pl. 2. p. 495.

### INSANITY.

1. It is sufficient ground of Equity for a perpetual Injunction to a Judgment in slander, that, at the time of speaking the defamatory words, and when the Judgment was obtained, the complainant in the Bill (who was defendant at law) was insane, or in a state of partial mental derangement on the subject to which those words related. *Homer v. Marshall's adm'r.* pl. 1. p. 466.

### INSTRUCTIONS TO JURIES.

1. Where the extent of the plaintiff's right under a Covenant depends, in part, upon extrinsic testimony; the Court ought not to instruct the Jury "that if, upon the said evidence, they shall be of opinion that certain facts are established, then the defendant has broken his covenant as charged in the declaration;" for it is not competent for the Court to say whether such facts are sufficient, or not, to warrant such conclusion, unless the sufficiency thereof had been duly submitted to its Judgment by a demurrer to the evidence. *Hollingsworth v. Dunbar*, pl. 1. p. 190.

### INTENTION.

1. The addition of a Codicil to a Will is not sufficient to operate as a devise of lands purchased by the Testator between the date of the Will and the date of the Codicil; there being no words in the Codicil indicating such to be the intention of the Testator. *Kendall's Ex'or. &c. v. Kendall &c.* pl. 1. p. 272.
2. To effect the manifest intention of a Testator, the word "children" may be taken as synonymous with issue. In this case, therefore, a devise of slaves to a married woman, "to her and her children for ever," was construed as a devise to her issue, the Court

being of opinion that the word, "children," was not intended to denote the devisee, or devisees, who were to take, nor to reduce the portion of the interest of the mother in and to the slaves before given to her by the same clause, but to declare the duration of her interest therein. *Merrymans v. Merryman and others*, pl. 1. p. 440.

### INTEREST.

1. Though Interest ought not to be given, *as of course*, in actions for the recovery of rent in arrear, it may nevertheless be given, under circumstances to be judged of by the Jury; and, in case of a general verdict allowing Interest, it shall be intended that sufficient circumstances existed to justify the allowance thereof. *Dow v. Adams's adm'rs*, pl. 1. p. 21.
2. But if the Jury state the circumstances in a special Verdict, the Court should disallow the Interest, if, under those circumstances, it ought not to be allowed. *Ibid.* pl. 2.
3. Interest on Rents in arrear ought not to be allowed, the circumstances being that there always were effects on the premises, liable to distress, sufficient to have satisfied the Rents, which were not paid, though demanded by the landlord. *Ibid.* pl. 3.
4. Under the circumstances of this case, one of the persons entitled to partition having been in possession and enjoyment of the whole land for many years, through want of knowledge of the title of the other partners, to whom he made their title known immediately after it was discovered by himself, upon a Bill filed by them for partition; it was considered equitable that he should account for their proportion of the rents received by him, deducting his disbursements for securing the title: that all the leases, and agreements of lease, he had made of the land should be acquiesced in by the plaintiffs; and that, for a part which he had sold, he should pay the price received with interest from the time of the sale; the time when he received it not appearing to be different from that of the sale. *Carter's Ex'or. v. Carter and others*, pl. 2. p. 108.
5. Interest also would have been allowed the other partners on their proportions of the rents received by him from the time of filing their bill; but, by their consent, it was allowed from the beginning of the next year after the last receipt. *Ibid.* pl. 3.
6. See *Credit*; and *West v. Belches*, pl. 1. p. 187.
7. Monies directed to be invested by Executors in Government securities should be accounted for, as if invested after a reasonable time for that purpose: but the Executors ought to be charged with Interest during such reasonable time, nor with Interest upon dividends of stock, if such dividends have not been actually

received. *Carter's Ex'ors. v. Cutting and Wife*, pl. 7. p. 323.

8. See *Lands*; and *Hundley v. Lyons*, pl. 2. p. 342.
9. When a person, who bought a slave with lawful notice of a better title, is decreed to deliver him and pay profits; Interest ought to be charged against him, upon the hire actually received by him from other persons, from the dates of his receipts; but not upon the profits of such slave while in his own possession without being hired; the same being unliquidated and merely conjectural sums, and which he was in no default in not paying. *Baird v. Bland and others*, pl. 1. p. 492.
10. Where Principal and Interest, due on a Bond, amount to more than the penalty; and damages are found by a Verdict, Judgment ought not be entered for the penalty and costs, to be discharged by the principal and interest, with the damages so assessed and the costs; but for the penalty and damages (if not exceeding those laid in the Writ) and the costs. *Tennant's Ex'or. v. Gray*, pl. 1. p. 494.
11. A stipulation in a Bond or Deed of trust, that, upon the debtors failing at any time to pay the annual Interest, the principal sum (which otherwise would not be payable until a distant day) shall be considered due, is in the nature of a penalty, against which it is the province of a Court of Equity to relieve. *Mayo v. Judah*, pl. 1. p. 496.
12. In such case, the payment or tender of the Interest, at any time before the sale under the Deed of Trust authorises the debtor to call upon the Court of Chancery to prevent the sale. And by virtue of the Act of Assembly concerning Executions, passed November, 25th, 1814, the debtor was authorised to substitute Bond and security in lieu of payment. *Ibid.* pl. 2.

### INTERLOCUTORY DECREE.

1. See *Decrees*; and *Birchell and others v. Belknap*, pl. 3. p. 442.
2. See *Infant*; and *Pickett & Wife v. Chilton*, pl. 5. p. 467.

### INVESTMENT.

1. See *Executors and administrators*; and *Carter's Ex'ors. v. Cutting & Wife*, pl. 7. p. 223.
2. Where an Executor is directed to invest money in stock, he ought to have the investment made in his own name as Executor, in order that, if necessary, the stock may be readily converted into money to pay the debts of his Testator. *Ibid.* pl. 8. p. 224.

### IRREGULARITY.

1. Whenever there is an issue in fact, and also a demurrer, the demurrer ought first regu-

larly to be decided; but an irregularity in this respect is not sufficient to reverse a Judgment to which there is no other objection. *Jones v. Stevenson*, pl. 4 p. 1.

2. A partition which has long been acquiesced in and acted upon by the parties generally, ought not to be disturbed at all on the ground of irregularity only; though, if unjust or illegal, it may be impeached by a party who never acquiesced. *Carters Ex'ors. v. Carter and others*, pl. 1 p. 108.
3. See *Lands*; and *McClellan v. Tomlinson*, pl. 1. p. 220.

### ISSUE.

4. See *Assumpsit*; and *Jones v. Stevenson*, pl. 2. p. 1.
2. *Quare*, whether it is competent to the plaintiff, in any action other than *Replevin*, to tender an issue in fact by a Replication, and an issue in law by a demurrer, to the same plea? *Ibid.* pl. 3. p. 1.
3. Whenever there is an issue in fact, and also a demurrer, the demurrer ought first regularly to be decided; but an irregularity in this respect is not sufficient to reverse a Judgment to which there is no other objection. *Ibid.* pl. 4. p. 1.
4. See *Equity*; and *Sims's administrator v. Lewis's Ex'or and others*, pl. 2. p. 29.
5. See *Intention*; and *Merryman v. Merryman and others*, pl. 1. p. 440.

### J

### JEOFFAILS.

1. See *Issue*; and *Jones v. Stevenson*, pl. 4. p. 1.
2. See *Jurisdiction*; and *Buster v. Ruffner*, pl. 1. p. 27.

### JOINDER IN DEMURRER.

1. If the case be clear against the party tendering a demurrer to evidence, the Court may refuse to compel the other party to join. *Dunbar v. Beale*, pl. 1. p. 24.

### JUDGMENT.

1. See *Equity*; and *Isaac v. Johnson*, pl. 1. p. 95.
2. A high sheriff, against whom a Judgment is rendered for the default or misconduct of his deputy, is entitled to recover of such deputy, not only the amount of the original Judgment, but all additions thereto, arising from coroner's commissions included in a forthcoming bond, costs of a Judgment on that bond, and costs and damages on appeals, or writs of *supersedeas*, until its final affirmance by the Court of Appeals. *Stoners Ex'or. of Bragg v. Smith's Ex'x.*, pl. 2. p. 401.
3. But a Judgment in his favour against the deputy, if rendered for more damages than have been recovered against himself, ought to

be reversed with costs. *Ibid.* pl. 3.

4. It is not equitable that a defendant to a Bill of Injunction, (in whose favour a Judgment at law was rendered for a sum of money which he had paid as security for the complainant,) should except to a commissioner's statement of the debits and credits between them, "to the time of the Judgment, on the ground that, from the circumstances of the case, and conduct of the parties, they considered their accounts as closed, and nothing due on either side;" and yet should select, and rely upon, the judgment as an item in his favour, in exclusion of the other items in the account. *Foster v. Clarke*, pl. 1. p. 430.
5. If, pending a suit, the parties, by an order of Court, refer the matter in controversy to arbitrators, whose award is to be made the Judgment of the Court; and, afterwards, by an agreement under seal, appoint a substitute for one of them; agreeing that an award to be made by the remaining referees and such substitute, shall be entered as the Judgment of the Court, such award may be entered, without any previous order of Court confirming the appointment of such substitute. *Manlove v. Thrift*, pl. 1. p. 493.
6. See *Interest*; and *Tenant's Ex'or. v. Gray*, pl. 1. p. 494.
7. In a suit for freedom, the validity of a Will, under which the plaintiff claims, ought not to be questioned; the same, (or a copy thereof, the original being destroyed,) having been admitted to record, as and for the last Will of the Testator, by the proper Court, whose judgment remains unappealed from, and the validity of such Will not contested by Bill in Equity. *Lemon v. Reynolds Adm'r. of Holmes*, p. 592.

### JURISDICTION.

1. A man indebted by bond, executed a conveyance of all his property, in trust, for payment of his just debts, in the first place; for his own support during life, in the second; and, afterwards, for the benefit of his wife, &c. He died, without a Will, or property acquired after the date of such conveyance; and no person administered on his estate. It was held that an assignee of the bond was not restricted to his remedy at law against the assignor; but, without bringing any action at law, might obtain relief in equity, by a decree for a sale of the property in the hands of the Trustee. *Taylor v. Ficklin & others*, pl. 1. p. 25.
2. In such case, if the fund in the possession of the Trustee prove insufficient, the plaintiff in equity may recover the balance of his claim, from a debtor of the obligor; and, in default of both these funds, in whole or in part, he may proceed against the assignor. *Ibid.* pl. 2. p. 25.

3. And, it seems, that, all the persons concerned being made parties, the Court may do complete justice in one suit, and make a full end of the whole controversy. *Ibid* pl. 3. p. 25.
4. In an action of *Assumpsit* in the Superior Court of a County, the declaration's laying the venue in a different County, and omitting to state that the cause of action arose within the jurisdiction of the Court, is not error sufficient in arrest of Judgment. *Buster v. Ruffner*, pl. 1. p. 27.
5. In such case the proceeding in Equity is proper, also because it avoids circuity of action, and the Court has the power of directing an issue, to try by a Jury the justice of the plaintiff's claim. *Sims's Adm'r. v. Lewis's Ex'or. and others*, pl. 2. p. 29.
6. A purchaser of land, suing for breach of a contract to make a good title, may with propriety come into a Court of Equity for pecuniary compensation, instead of proceeding at law in the first instance; if the vendor has conveyed away his property in trust, whereby there might be a difficulty in obtaining satisfaction of his judgment when recovered; the vendor, or his lawful representatives, together with the Trustees and *cestui que trust* being made defendants to the bill. *Sims's Adm'r. v. Lewis's Ex'or. & others*, pl. 1. p. 29.
7. See *Equity*; and *Royall's Administrators v. Royall's Administrator*, pl. 2. p. 82.
8. A Court of Equity has jurisdiction to decree the repayment of money paid by mistake; notwithstanding the plaintiff's remedy by *assumpsit* for money had and received. *Wilkin's v. Woodfin Adm'r. of Pearce*, pl. 1. p. 183.
9. A bill for relief against a writing purporting an acknowledgment of a gift of property by the complainant to the defendant, on the ground of its having been obtained by fraud, presents a proper case for equitable jurisdiction though a suit at law, founded upon such writing, might be defeated without coming into equity. *Johnson v. Hendley*, pl. 1. p. 219.
10. In an action on the case for consequential damages occasioned by the erection of a mill, if the damages recovered be less than one hundred dollars, the defendant cannot appeal to the Court of Appeals; notwithstanding it appears from the Record that the right to erect the mill was drawn in question. *Skipwith v. Young*, pl. 1. p. 276.
11. The Clerk of this Court being required, by an Act of Assembly enacted since he came into office, to give bond and security for performance of his official duty, the Court considered it not proper to dispense with or sanction the non-execution of such bond, or to pronounce any opinion as to the consequences of his failing to do so; but left it to him to execute the same, or not, at his own peril, to be adjudged of in case of failure, by a Court having competent jurisdiction of the case. *Harrison Dance's case*, pl. 1. p. 349.
12. The several Superior Courts of Chancery have jurisdiction in cases where their process is served, upon the defendant, within their respective districts; though his place of residence, and also the land in controversy, be in a different district. *Hughes v. Hall*, pl. 1. p. 431.

## JURY.

1. Though interest ought not to be given, as of course, in actions for the recovery of rent in arrear, it may nevertheless be given under circumstances, to be judged of by the Jury; and, in case of a general verdict allowing interest, it shall be intended that sufficient circumstances existed to justify the allowance thereof. *Dow v. Adams's Adm'rs*. pl. 1. p. 21.
2. But if the Jury state the circumstances in a special verdict, the Court should disallow the interest, if, under these circumstances, it ought not to be allowed. *Ibid*. pl. 2. p. 21.

## JUSTIFICATION.

1. Whether, in an action for words, circumstances of suspicion, not amounting to full justification, may be proven in mitigation of damages. *Chastwood v. Mayo*, pl. 1. p. 16.
2. In an action of slander, for saying of the plaintiff, "that he had taken the defendant's slave, and that the defendant would have him sent to the penitentiary for it;" the plea being justification, "because the plaintiff did take a certain female slave, the property of the defendant, out of his possession, in such manner and with such intention, as would subject him to such punishment;" to which the plaintiff replied generally, and issue was thereupon joined, it was decided, that, to support this plea of justification, it was sufficient for the defendant to shew that the slave, so averred to be his property, had been a long time in his possession as his slave, and was purchased by him as such, notwithstanding the pendency of a suit at that time in her behalf for freedom; for, if her right to freedom could be enquired into in this action, an issue thereupon ought to have been tendered by the plaintiff, whereby the defendant might have known to what point to apply his evidence. *Hook's adm'rs. v. Hancock*, pl. 1. p. 546.

## L

## LANDS.

1. See *Jurisdiction*; and *Sims's administrator v. Lewis's Ex'or. and others*, pl. 1. p. 29.
2. See *Escheats*; and *the Commonwealth v. Martin's Ex'ors. and Devisees*, pl. 1. p. 117.
3. See *Escheats*; and *the Commonwealth v. Selden & Seddon*, pl. 1. p. 160.
4. See *Mistake*; and *Graham v. Hendren*, pl. 1. p. 185.

5. A patent is not void on the ground that the survey was made first, and the warrant obtained afterwards; though such irregularity appear on its face. *McClean v. Tomlinson*, pl. 1. p. 220.
6. An omission to insert the name of the County in which the land lies, is not sufficient to vitiate a Patent; the place being described with reasonable certainty. *Ibid* pl. 2
7. See *Salé*; and *Carter's Executors v. Cutting and Wife*, pl. 6. p. 223.  
The addition of a Codicil to a Will is not sufficient to operate as a devise of lands purchased by the Testator between the date of the Will and the date of the Codicil; there being no words in the Codicil indicating such to be the intention of the Testator. *Kendall's Ex'or. and Devise v. Kendall and others*, pl. 1. p. 272.
8. See *Power*; and *Grantland v. Wight Ex'or.* &c. pl. 2. p. 295.
9. See *Lien*; and *Wilson v. Graham's Ex'ors.* &c. pl. 1. p. 297.
10. See *Equity*; and *Stovall v. London*, pl. 1. p. 299
11. See *Payment*; and *Jackson's assignees v. Cutright and Clark*, pl. 3. p. 308.
12. See *Equity*; and *Legrand v. Hampden Sidney College*, pl. 3. and 4. p. 324.
13. See *Notice*; and *Bolling v. Bolling and others*, pl. 2. p. 334.
14. Whenever it does not clearly appear that Land was sold by the *tract* and not by the *acre*, the vendee ought to be responsible for the value of the *surplus* land found in the *tract*; and, if no circumstances appear to give a different rule such value is to be estimated by the average value, per acre, of the whole purchase. *Hundley v. Lyons*, pl. 1. p. 342.
15. In a contract for sale of land, if no day be specified for delivering the Deed and possession of the Land, but the money be payable after delivery of the Deed, it must be understood that the Deed is to be delivered, and possession given, *without delay*. If therefore, (in consequence of a misunderstanding between the parties in relation to the terms of the sale) this be not done; the vendor is bound to account for and pay the profits of the land received by him after the contract, and the vendee to pay interest on the money, from the time when it would have been payable if the Deed had been immediately delivered. *Ibid*. pl. 2.
16. In such case, in a decree for specific performance, liberty should be reserved to the vendee to use the name of the vendor to recover rents, in arrear, from lessors of the land, which became due between the date of the contract and delivery of the Deed. *Ibid*. pl. 3
17. See *Dower*; and *Moore v. Gilliam*, pl. 2. p. 346.
18. See *Equity*; and *Crenshaw v. Smith & Co.* pl. 1. p. 415. and *Wood's Ex'or. and Miller v. Hudson and others*, pl. 1. p. 423.
19. See *Process*; and *Hughes v. Hall*, pl. 1. p. 431.
20. See *Pledge*; and *Williams v. Price*, pl. 5. and 6. p. 507.

# LEASES.

1. See *Lands*; and *Hundley v. Lyons*, pl. 3. p. 342.
2. See *Disability*; and *Williams v. Price*, pl. 12. p. 507.

# LEGACY.

1. If a *fieri facias* against the goods of a Testator be levied on slaves which by his Will were specifically bequeathed, and after his death were allotted to the Legatee by the Executor, who thereupon held them, and hired them out as *guardian* for such Legatee; a Court of Equity ought, by Injunction, to stop the sale, until an account of the assets remaining unadministered shall be taken; and, upon such account, to decree, that the creditor shall be satisfied out of those assets; or (if there be a deficiency out of the residue of the estate of which the Testator died possessed; having regard to the rights of the several legatees under the Will. *Scott and Wife v. Halliday & Hinton*, pl. 1. p. 163.
2. A *fi. fa.* against the estate of a Testator, cannot lawfully be levied on slaves which, being specifically bequeathed, are in possession of the *legatees* as their property, either by actual delivery from the Executor, or by his permission. *Sampson v. Bryce Ex'or. of Mitchell*, pl. 1. p. 175.
3. In such case, a Court of Equity may award an Injunction to prevent the sale of the property. *Ibid*, pl. 2.
4. A Testator directed that, *after his debts were paid*, all his slaves, &c. be furnished for three years from his estate, to raise certain pecuniary legacies, by working his plantation called Farmer's Hall, which he then specifically devised: in such case, those legacies were no farther chargeable on the *slaves*, &c. than on such part thereof as should remain after the payment of debts and expenses of administration, and of a general charge on the estate by another clause in the Will; and therefore must *abate* so far as the same were not raised, within the three years, by the use of the said *residue* of slaves &c. on the Farmer's Hall plantation: with liberty to sever, and apply to that use, any drops on the ground at the expiration of the said term of three years. *Mathews Ex'or. of Garnett v. Noel*, pl. 1. p. 400.
5. What accounts ought to be taken in such case before a decree, for payment of those

legacies, ought to be pronounced. *Ibid.* pl. 2.

### LEGATEES.

1. A creditor having obtained a Judgment against an Executor as such, and sued out a *fi. fa. de bonis testatoris*, which proved ineffectual, may either resort to his action at law to establish a *devastavit*, or file a Bill in Equity against the Executor and Legatees, for an account of assets and proportional contribution to pay the debt. *Sampson v. Payne's Ex'or. and Legatees*, pl. 1. p. 176.
2. In such case, if there be a dispute between the Executor and Legatees, whether, under the circumstances, he ought not to pay the debt without any contribution from them, and if some of them be not made parties, the Court may, with propriety, dismiss the bill as to the Legatees; but if it appear that the Executor has delivered over to them property of the Testator, which would have been sufficient to pay the debt, he ought to be decreed to pay it *de bonis propriis*, and left to his remedy against them. *Ibid.* pl. 2.
3. A Bill in Equity in behalf of persons, suing as "children" of a deceased residuary Legatee for his share of the residuum cannot be sustained; it should appear that the plaintiffs are the administrators, or other legal representatives of such Legatee. *Hay's Ex'or. and others, v. Hay's and others*, pl. 1. p. 418.

### LIEN.

1. To prevent circuity of action, and attain the ends of natural justice, a Court of Equity will completely indemnify one of the sureties in a Bond by means of a lien on the property of the principal obligor existing in favor of the other surety; notwithstanding he has himself relinquished a lien on the same property originally created for his indemnification. And, for this purpose, the Court will compel the creditor (all the parties interested being before it) to resort to that property in the first place for satisfaction of his debt. *West v. Belcher*, pl. 3. p. 187.
2. Of two equitable incumbrancers, he that hath the preferable right to call for the legal estate is entitled to preference; though he hath not actually got it in, nor got an assignment, nor even possession of the Deed conveying the outstanding legal title; and though his lien is of subsequent date to the other incumbrance. *Williamson v. Gordon's Ex'ors* pl. 2. p. 257.
3. A vendor of land, by executing a conveyance and taking Bond and security for the purchase money, discharges the land from his equitable lien, even while it continues the property of the purchaser. *Wilson and others v. Graham's Ex'or. and Devises*, pl. 1. p. 297.

4. On a Bill for specific performance exhibited by the devisees of the purchaser, the Court, in decreeing the conveyance, ought to reserve to the vendor a lien on the land, to secure the payment of the purchase money. *Hundley v. Lyons*, pl. 4. p. 342.
5. See *Notice*; and *Travis v. Claiborne*, pl. 1. p. 435.
6. Personal and even transitory and fluctuating property may be made the subject of a lien, at the pleasure of the contracting parties; but, generally, explicit words should be used to effect that purpose, where such lien is not raised by operation of law or Equity. *Williams v. Price*, pl. 8. p. 507.
7. It seems just, however, that the property purchased should be considered liable for the purchase money; especially, in a case in which a personal exemption of the purchaser has been stipulated; and where the parties themselves, by their subsequent acts, appear to have expounded the contract in that sense. *Ibid.* pl. 9.
8. If personal property, consisting of perishable articles, provisions, raw materials for manufacture, implements necessary for a furnace, &c., be pledged, together with the furnace and land, for payment of the purchase money; the lien is not to be construed so strictly as to tie up the property from use; nor that even the same kind and amount of property shall be forthcoming in future; without a stipulation to that effect: but the purchaser is bound to make good only such waste thereof as shall have arisen from his fraud, wilful default or misconduct, and to give up what remains on hand when he surrenders the property in satisfaction of the debt. *Ibid.* pl. 10.

### LIFE ESTATE.

1. See *Hire*; and *Medley v. Jones*, pl. 2. p. 98.
2. See *Executors and administrators*; and *Hudson and others v. Hudson's adm'r.* pl. 1. p. 180.
3. A Testator, after devising certain lands and other property to his wife, during her life, directed, "that she should be furnished during her life out of his whole estate, with whatever provision and necessities of every kind she might have occasion for, to support herself and family in the same manner as had always lived, or in any other manner she might think proper." *Quare* whether, under this devise, she had not a life interest in certain lands, devised to one of his sons, in general terms, without specifying when that son was to be put into possession? and a right to convert the whole profits thereof to the support of herself and the children generally during her life? *Bolling v. Bolling and others*, pl. 1. p. 334.

## LIMITATION.

1. A Testator gave to his son W. a tract of land, "during his natural life, and then to his heirs lawfully begotten of his body; that is, born at the time of his death, or nine calendar months thereafter; and for want of such heirs, then, to his son I.'s two sons Jacob and George; one of them to set a price on the whole of it, and give or receive one half of that sum from the other." This was a good limitation by way of contingent remainder, to Jacob and George. *Warners v. Mason and Wife*, pl. 1. p. 242.
2. W. A. by his last Will devised that, "in case he should die before his brother R. A. all his estate both real and personal should descend to him and his heirs forever; but in case his said brother should die without a lawful heir, it should then be equally divided between his brother W. A. and his nephew S. A. to them and their heirs forever." R. A. having died in the life time of the deviser and without issue, the limitation over could not take effect; but the estate descended to the heirs general of the deviser. *Allen v. Parham*, pl. 1. p. 457.
3. In such case, if the devisee had survived the deviser, he would have taken an Estate Tail, which, by the Act of Assembly, would have been turned into a fee simple; and the limitation over could not have taken effect. *Ibid.* pl. 2.

## LIMITATIONS (ACT OF.)

1. See *Loan*; and *Garth's Executors v. Barksdale*, pl. 1. p. 101.
2. See *Pleading*; and *Jackson's assignee v. Cutright and Clark*, pl. 1 & 2. p. 308.

## LOAN.

1. Five years peaceable and uninterrupted possession of slaves, under a Loan not evidenced by Deed duly recorded, vests a title in the loanee which inures in favour of his creditors, and cannot be divested, as to them, by his returning the same to the lender, after the said five years have expired. *Garth's executors v. Barksdale*, p. 101.
2. See *Interest*; and *West v. Belches* pl. 1. p. 187.
3. A demand of slaves by the lender, who thereupon receives, and immediately redelivers them to the loanee, to be held on the same terms as before, (such demand, receipt, and redelivery being in private,) is not sufficient to bar the rights of creditors, under the Act to prevent frauds and perjuries. *Boyd and Smeppson and others v. Steinback and others*, pl. 1. p. 305.
4. A Loan of slaves, though not declared by deed in writing duly recorded, and therefore

void as to creditors, (the loanee having continued in possession five years without such demand as would bar their right,) is nevertheless effectual between the parties and their representatives. If, therefore, the loanee die in possession of such slaves, they are not to be considered assets belonging to his estate, nor can be recovered as such; being liable to his creditors, so far as their claims remain unsatisfied by the assets in the hands of his Executor or administrator, but no farther. *Ibid.* pl. 2.

6. In such case, if the assets be deficient, a Court of Equity will give the Creditors relief, on a bill in their behalf, against the lender, and the Executor or administrator of the loanee; making the assets liable in the first place, so far as they extend; after which, it will allow the lender a limited time to make good the deficiency, and, in default thereof, direct a sale of the slaves. *Ibid.* pl. 3.

## LUNACY.

1. See *Insanity*; and *Horne v. Marshall's administratrix*, pl. 1. p. 466.

## M

## MADNESS.

1. See *Slender*; and *Horne v. Marshall's administratrix* pl. 1. p. 466.

## MARRIAGE SETTLEMENT.

1. A deed of marriage settlement, executed before, and recorded after, the marriage, but within the time required by law, is conclusive against the Creditors of the Husband, for debts contracted before the marriage: and this, although such deed was recorded upon the acknowledgment of the parties, without any privy examination of the wife. *Scott and Wife, &c v. Gibbon and Co.* pl. 1. p. 86.
2. See *Equity*. No. 9; and *Ibid.* pl. 2.
3. Construction of a marriage settlement, by which the personal estate of the intended wife was conveyed to trustees for her use until the marriage; then, upon trust that the husband and Wife should enjoy the profits during the coverture; and, afterwards, that the trustees should assign, transfer and pay over all the said property (that might remain) to the Wife, in case she survived the husband, but, if she died before him, then to such person or persons, as she should, notwithstanding her coverture, appoint by Deed or Will, "to the intent that the same might not be at the disposal of, or subject to the control, debts, forfeitures or engagements of the husband;" with a provision that, in the event of her surviving him, and claiming any part of his estate, by right of dower or otherwise,



the trustees should hold for his benefit and that of his Executors, &c.; but without any provision for the event of his surviving her, and her failing to make any appointment. The Husband, having survived the Wife, who made no appointment, was entitled to the property as her administrator, and not compelled to make distribution to her children by a former husband. *Pickett & Wife v. Chilton*, pl. 1. p. 467.

#### MASTER AND SERVANT.

1. An employer or master is, in general, not responsible for a wilful and unauthorized trespass committed by his agent, overseer, or servant. *Harris v. Nicholas*, pl. 4. p. 483.

#### MILITIA.

1. The Act of January 10th, 1815 on the subject of Writs of Habeas Corpus does not authorize the issuing of a Writ of Error by the Court of Appeals to a judgment discharging from custody a person confined by sentence of a Court Martial for failing to pay a fine imposed on him for not appearing at the place of Rendezvous, and not marching, in obedience to a Requisition of Militia; for in such case, there is no discharge, by the Judgment, of a person from the service of this State or of the United States. *Attorney General v. Fenton and Shepherd*, pl. 1. p. 282.

#### MILLS.

1. The breach of a covenant, charged in the declaration, being that, during a specified time, the defendant deprived the plaintiff of the water necessary for his mill by diverting it therefrom, and suffering it to be diverted by others; the plaintiff is not limited in proving acts committed by the defendants or other persons to the period stated in the declaration; but may prove previous acts, in consequence of which the injury was sustained during that time. *Hollingsworths v. Dunbar*, pl. 2. p. 199.
2. In an action upon the case for consequential damages occasioned by the erection of a mill, if the damages recovered be less than one hundred dollars, the defendant cannot appeal to the Court of Appeals, notwithstanding it appear from the record that the right to erect the mill was drawn in question. *Skipwith v. Young*, pl. 1. p. 276.

#### MISTAKE.

1. See Possession; and *Carter's Executors v. Carter and others*, pl. 2. p. 223.
2. A Court of Equity has jurisdiction to decree the re-payment of money paid by mistake; notwithstanding the plaintiff's remedy by *assumpsit* for money had and

received. *Wilkins v. Woodfin, adm'r of Pearce*, pl. 1. p. 183.

3. Where it appears that, at the time of entering into a contract for sale of a tract of land, there was a misunderstanding, between the parties, as to the identity of the land to which the contract related, a Court of Equity in its discretion, ought not to interfere by decreeing a specific performance. *Graham v. Henderson*, pl. 1. p. 185.
4. A mistake of the defendant's counsel, in advising him that he could avail himself of the defence without pleading, is sufficient ground for leave to file the pleas in addition to the answer. *Jackson's assignee v. Cuthright and Clark*, pl. 2. p. 308.

#### MITIGATION.

1. Whether, in an action for words, circumstances of suspicion, not amounting to full justification, may be proven in mitigation of damages. *Chenwood v. Mayo*, pl. 1. p. 16.

#### MORTGAGE.

1. A mortgage being attested by one witness only, and therefore defective, (see 1 R. C. ch. 90. § 1 and 4. p. 157); yet, if the mortgagee has recovered upon it at law, a Court of Equity will not regard the defect. *Dust v. Conrad*, pl. 2. p. 411.
2. If the mortgagee of a slave recover him in Detinue against a person claiming under a bona fide purchaser from the mortgagor; Equity will consider such person as standing in the place of the mortgagor, and entitled to redeem the slave by paying the debt. *Ibid.* pl. 3.
3. It will, also, at the same time, (to make an end of the controversy,) give him relief against the mortgagor, who sold the slave with warranty of the title. *Ibid.* pl. 4.
4. In such case the right of the derivative purchaser to redeem the slave, and to relief against the mortgagor, who improperly sold him, is not affected by his having submitted to arbitration the suit brought against him by the mortgagee. *Ibid.* pl. 5.
5. If the assignee of a mortgage, having obtained a decree of foreclosure and sale, become himself the highest bidder; but, in consideration of a sum of money in hand, and a promise of the assignor to pay, in a short time, the balance of the debt for which the assignment was made, he agree to hold the property as security for said debt, but in trust for the assignor; a Court of Equity will compel him to give up and re-convey the property, upon the assignor's paying him the balance due on the bond, with the costs of foreclosure and sale, deducting therefrom not only the actual profits he received while he held the property, but such profits as, but for his wilful default, he might have received, and also the amount

of any waste or dilapidations, committed by him, or suffered by his neglect. *Southgate v. Taylor*, pl. 1. p. 420.

6. A sale of mortgaged land by commissioners in Chancery ought to be set aside, and another decreed, upon its appearing to the Court that the highest bidder at such sale had previously agreed with a purchaser from the mortgagor, that he would allow such purchaser to redeem the land, within a limited time, by repaying him his money with interest; and that such agreement being known at the sale, other persons were induced to refrain from bidding, and consequently the land was struck off to him at a price inferior to its value. *Woods's Ex'or. & Miller v. Hudson and others*, pl. 1. p. 423.
7. The Act of Assembly "concerning the sale of property under Executions and incumbrances," passed February 1st, 1808, (2 R. C. p. 156,) applied to a sale of mortgaged land by commissioners in Chancery, after the first day of March, 1808; notwithstanding the decree was pronounced, and the time limited for paying the money to redeem the land had elapsed before the passage of that Act. *Ibid.* pl. 2.

#### MOTION.

1. See *Sheriffs*; and *Stowers Executor of Bragg v. Smith's Executrix*, pl. 1. p. 401.

#### MUTUAL ASSURANCE SOCIETY AGAINST FIRE.

1. The President and Directors of the Mutual Assurance Society against Fire on Buildings of the State of Virginia are empowered, in calling for quotas to supply a deficiency in its funds, to discriminate between the members, so as to make the requisition from those only who were insured at the time when the deficiency occurred. *Greenhow Agent for the Mutual Assurance Society v. Buck*, pl. 1. p. 283.

#### N

#### NEGOTIABLE NOTES.

1. See *Promissory Notes*; and *Robertson & Co. v. Williams & Smith*, pl. 1. p. 381.
2. Under the Act of 1812 ch. 2. § 18, 19, 20, a Note negotiable at Bank may be given in evidence, if duly stamped before it became payable, though not so stamped when it was executed. *Hannon & High v. Balle*, pl. 1. p. 490.

#### NEW TRIAL.

1. Relief given in Equity in a pauper's suit for freedom by awarding a new trial at law, and (a verdict being certified,) decreeing for the plaintiff; upon a bill stating that, in the previous proceedings, he had not been permitted

to obtain his testimony, and on proof now produced in support of his right; notwithstanding the defendant pleaded, in bar to such relief, a former verdict and judgment, by which the plaintiff was declared to be a slave, and a decree of another Court of Chancery dismissing a similar bill exhibited on his behalf; from which judgment and decree he had not appealed. *Isaac v. Johnson*, pl. 1. p. 95.

2. See *Penalty*; and *Tenant's Ex'or. v. Gray*, pl. 2. p. 494.

#### NOTICE.

1. Notice of a motion to supersede a *distringas*, or for a *ca. sa. or fi. fa.* in lieu thereof, need not be given by the plaintiff to the defendant. *Garland v. Bugg*, pl. 4. p. 168.
2. An Agent, endorsing a note for the benefit of his principal, who assures him that he shall not be held responsible, ought not to be compelled to pay the money at the suit of a person to whom the note is endorsed with notice of such equity; but the decree should be against the principal. And it seems if the endorser had no such notice, yet, if the principal be solvent, the decree ought still to be against him. *Chalmers, Jones & Co. v. M'Murdo*, pl. 4. p. 252.
3. A purchaser of land, encumbered by a deed of trust (duly recorded) for securing a debt, having bought of the debtor with consent of the trustees, and paid the purchase money, by discharging the debt secured by the deed, and by paying other sums of money; having also a deed of bargain and sale from the debtor, (though not recorded within the time prescribed by law,) and being put in possession of the land, he was adjudged to have the preferable right to call for the legal estate outstanding in the trustee, and to be protected against the claim of a creditor suing in equity, upon an agreement on the part of the debtor, (bearing date before the purchase, but subsequent to the Deed of Trust,) to secure him by Deed of Trust on the same land; of which agreement, the purchaser had no notice when he made the contract, and paid his money. *Williamson v. Gordon's Ex'ors.*, pl. 1. p. 257.
4. A devisee is, in general, bound to take notice of the contents of the Will under which he received, when of full age, certain lands and other property from the Executors; and Will having then been proved and recorded. *Bolling v. Bolling and others*, pl. 2. p. 334.
5. See *Promissory Notes*; and *Ritchie & Wales v. Moore*, pl. 3. p. 388.
6. If a slave, conveyed by Deed of Trust to secure the payment of a debt, be permitted to remain in the debtor's possession, who thereupon, by an agent, sends him out of the State, and sells him, such agent, not having actual notice of the lien on the slave, before

he pays over the money to his principal, is not responsible to the trustee, or the creditor; notwithstanding the deed was duly recorded. *Travis v. Claiborne*, pl. 1 p. 435.

7. See *Purchaser*; and *Baird v. Bland and others*, pl. 1. p. 492.

#### NULLA BONA.

1. The assignee of a bond may recover of the assignor after suing the obligor, and obtaining a Judgment and Execution with a return of *nulla bona*, notwithstanding his attorney directed that appearance bail be not required of the obligor. *Harrison's Adm'r. v. Rains's Adm'r.*, pl. 1. p. 456.

#### O

#### OMISSION.

1. See *Infant*; and *Pickett & Wife v. Chilton*, pl. 5. p. 467.

#### ONUS PROBANDI.

1. A purchaser, having taken possession of the estate, is not entitled to relief in equity against a judgment for the purchase money, on the ground that the title of the vendor is not clearly shown to be good, but is bound, on his part to prove it to be bad. *Grantland v. Wight, Ex'or. &c.* pl. 1. p. 285.

#### OVERSEER.

1. An employer or master is, in general, not responsible for a wilful and unauthorized trespass committed by his agent, overseer or servant. *Harris v. Nicholas*, pl. 4. p. 483.
2. *Quære*, whether an employer who continues in his service an overseer noted for cruelty, may not be made liable by an action upon the case, for the value of a hired negro whipped to death by such overseer, though without any direction from him? *Ibid.* pl. 5.

#### OYER.

1. In debt on a Bond, if the declaration describe it as a writing obligatory for a sum of money; and the defendant, without praying oyer of the Bond, plead payment, and also several other pleas, alleging performance of a condition, according to which the Bond was to be discharged, by the delivery of a certain quantity of iron; and, issues being joined thereupon, the parties go to trial; and it appears, by bills of exceptions, that the evidence before the Jury did not apply to the plea of payment, but to the other pleas only; a verdict for the defendant ought to be set aside, and a new trial awarded, with leave to him to take oyer of the condition of the Bond, and plead *de novo*; all his pleas,

except that of payment, being irrelevant to the claim set out in the declaration, and, therefore, the issues joined upon them being immaterial. And this is the case, notwithstanding a copy of a Bond, corresponding with that described in the pleas, be inserted in the transcript of the record, and certified by the clerk to be the Bond on which the declaration was filed. *Beatty v. Smith and others*, pl. 1. p. 39.

#### P

#### PARTIES.

1. See *Jurisdiction*; and *Taylor v. Ficklin*, pl. 3. p. 25.
2. See *Purchaser*; and *Sims's administrator v. Lewis's Executor and others*, pl. 1. p. 29.
3. See *Legatees*; and *Sampson v. Payne's Executors and Legatees*, pl. 1. and 2. p. 176.
4. On a Bill exhibited by the holder of a promissory note, against the maker and all the endorers; to avoid circuity of action, the Court of Equity may fix the debt on the person first responsible. *Chalmers, Jones & Co. v. M'Murdo*, pl. 1. p. 252.

#### PARTITION.

1. A Partition, which has long been acquiesced in, and acted upon by the parties generally, ought not to be disturbed at all on the ground of irregularity only; though, if unjust or illegal, it may be impeached by a party who never acquiesced. *Carter's Ex'or. v. Carter and others*, pl. 1. p. 106.
2. Under the circumstances of this case, one of the persons entitled to partition having been in possession and enjoyment of the whole land for many years, through want of knowledge of the title of the other partners, to whom he made their title known immediately after it was discovered by himself, upon a Bill filed by them for partition; it was considered equitable that he should account for their proportions of the rents received by him, deducting his disbursements for securing the title: that all the leases, and agreements of lease, he had made of the land should be acquiesced in by the plaintiffs: and that, for a part which he had sold, he should pay the price received with interest from the time of the sale; the time when he received it not appearing to be different from that of the sale. *Ibid.* pl. 2.
3. Interest also would have been allowed the other partners, on their proportions of the rents received by him from the time of filing their bill; but, by their consent, it was allowed from the beginning of the next year after the last receipt. *Ibid.* pl. 3.

PARTNERSHIP.

1. In an action against a Mercantile Company, a set off of a debt due to an individual partner cannot be allowed. *Ritchie & Wales v. Moors*, pl. 4. p. 388.
2. An agreement, to build a Tavern in partnership, at the joint expense and risk, and for the joint benefit, of the contracting parties, to be held by them in fee simple, decreed to be specifically performed, at the instance of a partner who furnished the ground for the purpose, and had fully performed the contract on his part, notwithstanding many of the partners were unwilling to carry it into effect, because, in their opinion, a change of circumstances had rendered the scheme unprofitable. *Birchett and others v. Bolting* pl. 1. p. 442.
3. If, by direction of the plaintiff, the Writ be served on one only of two partners in trade, when the Declaration shews that the plaintiff knew the names of both, and he got a Verdict, upon the plea of *non assumpt*, pleaded by the partner, on whom the Writ was served; Judgment ought to be arrested. *Shields v. Oney*, pl. 1. p. 550.

PATENT FOR LAND,

1. A patent is not void, on the ground that the survey was made first and the warrant obtained afterwards, though such irregularity appear on its face. *McClean v. Tomlinson* pl. 1. p. 220.
2. An omission to insert the name of the County in which the land lies, is not sufficient to vitiate a Patent, the place being described with reasonable certainty. *Ibid.* pl. 2.

PAYMENT.

1. A Bond to stay Execution on a Judgment was assigned, for value received, without notice to the assignee of any Equity against it, and after dissolution of an Injunction to the Judgment. The security in said Bond, who was also Attorney in fact for the principal obligor, paid it off, without Execution and without any particular instruction to do so: after which, the Chancellor reinstated the Injunction. It was held that such payment by the Attorney in fact was a waiver of the Equity in behalf of the principal, who, therefore, notwithstanding the reinstatement of the Injunction, was not entitled to recover back the money paid. *Medley v. Jones*, pl. 1. p. 98.
2. See *Assignee*; and *Wilson v. Davisson*, pl. 1. p. 178.
3. See *Mistake*; and *Wilkins v. Woodfin adm'r of Pearce*, pl. 1. p. 183.
4. If a father make payments in part of a gaming debt of his son, and never reclaim them in his life time, but provide by his Will a fund

for paying the balance; they should not, after his death, be claimed of his son's estate, but considered as payments or advancements to the latter; as payments, to the amount of any previous existing accounts of the son against the father; and, beyond that amount, as advancements to the son. *Carter's Ex'ors. v. Cutting and wife*, pl. 3. p. 223.

5. An Executor ought not to be allowed a credit for paying a debt of his testator, appearing, on the face of the written instrument intended to secure it, to have been for money won at unlawful gaming. *Ibid.* pl. 4.
6. It seems that payment of the purchase money is not sufficient part performance of a verbal contract for land, to take it out of the Statute of Frauds. *Jackson's assignee v. Culright and Clark*, pl. 3. p. 308.

PENALTY.

1. Where the Principal and Interest, due on a Bond, amount to more than the penalty, and damages are found by a Verdict, Judgment ought not to be entered for the penalty and costs, to be discharged by the principal and interest, with the damages so assessed and the costs; but for the penalty and damages (if not exceeding those laid in the Writ,) and the costs. *Tennant's Ex'or. v. Gray*, pl. 1. p. 494.
2. But, if the damages found by the Jury exceed those in the Writ, a new trial ought to be granted, unless the plaintiff will release the excess of damages; if which be done, Judgment may be entered for the penalty, with the residue of the damages so found, and costs. *Ibid.* pl. 3.
3. A stipulation in a Bond, or Deed of trust, that, upon the debtor's failing at any time to pay the annual interest, the principal sum (which otherwise would not be payable until a distant day) shall be considered due, is in the nature of a penalty against which it is the province of a Court of Equity to relieve. *Mayo v. Judah*, pl. 1. p. 495.

PERFORMANCE.

1. See *Pleading*; and *Cooke v. Graham's adm'r.* pl. 1. p. 172.
2. It seems that payment of the purchase money is not sufficient part performance of a verbal contract for land, to take it out of the statute of Frauds. *Jackson's assignee v. Culright and Clark*, pl. 3. p. 303.

PERPETUATION OF TESTIMONY.

1. Depositions taken in a suit to perpetuate testimony are not to be read as evidence in a subsequent suit, unless it appear that the Witnesses are dead, or otherwise out of the

power of the Court. *Lawrence v. Swann* 2. and others, pl. 2. p. 332.

### PERSONAL PROPERTY.

1. Personal, and even transitory and fluctuating property may be made the subject of a lien, at the pleasure of the contracting parties; but, generally, *explicit words* should be used to effect that purpose, where such lien is not raised by operation of law or Equity. *Williams v. Price*, pl. 8. p. 507.

### PLAINTIFF.

1. See *Pleading*; and *Jones v. Stevenson*, pl. 2. p. 1.
2. See *Fraud*; and *Sims's adm'r. v. Lewis's Ex'or* and others, pl. 3. p. 29
3. It seems that according to the Common Law, still in force in Virginia, the plaintiff in Detinue is not entitled to the issues of the defendants land, or other property, received by the Sheriff upon the *Distringas*. *Garland v. Bugg*, pl. 5. p. 166.
4. See *Decree*; and *West v. Belches*, pl. 4. p. 187.

### PLANTATION UTENSILS.

1. What articles are not comprehended in a bequest of stock, plantation utensils, and household furniture. *Kendall's Ex'or. &c. v. Kendall &c.* pl. 2. p. 272.

### PLEADING.

1. In assumpsit upon an agreement for delivery to the plaintiff of a quantity of merchantable flour barrels, at his the defendant's shop at W., at certain times, until the whole number should be delivered; with a stipulation that, if the plaintiff should not then and there be ready to receive them, the same should be counted out in the presence of J. A. who then resided at W., and he thereafter the property and at the risk of the plaintiff; it is a good and sufficient plea in bar to the action, that the defendant was ready, at his shop at W., at the times appointed, to deliver the requisite number of barrels to the plaintiff, who was not then and there ready to receive them; that thereupon, the defendant, from time to time, counted out the barrels, according to the agreement, in the presence of J. A., until he moved away from W.; and that after the said J. A., had moved from W., he the defendant, at his said shop at W., at the times for delivery stipulated, had the number of barrels, required by the agreement, ready to be delivered to the plaintiff and counted out for him, and then and there required the plaintiff to receive the same, which he entirely neglected to do. *Jones v. Stevenson*, pl. 1. p. 1.

A replication to such plea, stating that the defendant did not count out in the presence of J. A., the barrels set forth in his plea, nor count out, thereafter, for the plaintiff, at the stipulated times, the barrels agreed to be delivered; without averring that the defendant did not then and there require the plaintiff to receive the same; is bad upon demurrer, as being an answer to a part only of the plea. *Ibid* pl. 2.

*Quære*, whether it is competent to the plaintiff, in any action other than *Replevin*, to tender an issue in fact by a Replication, and an issue in law by a Demurrer, to the same plea? *Ibid* pl. 3

In debt on a Bond, if the declaration describe it as a writing obligatory for a sum of money; and the defendant, without praying over of the Bond, plead payment, and also several other pleas alledging performance of a condition according to which the Bond was to be discharged by the delivery of a certain quantity of Iron; and, issues being joined thereupon, the parties go to trial; and it appear by Bills of Exceptions, that the evidence before the Jury did not apply to the plea of payment, but to the other pleas only; a Verdict for the defendant ought to be set aside, and a new trial awarded with leave to him to take over of the condition of the Bond, and plead *de novo*; all his pleas, except that of payment, being irrelevant to the claim set out in the declaration, and therefore the issues joined upon them bring immaterial. And this is the case, notwithstanding a copy of a Bond corresponding with that described in the pleas be inserted in the transcript of the Record, and certified by the Clerk to be the Bond on which the declaration was filed. *Bentley v. Smith and others*, pl. 1. p. 39

5. If the Count, upon a Writ of Right, be in behalf of two demandants, a plea opposing the claim of one, without mentioning that of the other, is defective, and if, without any replication by the demandants, a Verdict be found and Judgment rendered in their favour, such Judgment must be reversed and all the proceedings subsequent to the Count set aside. *Chichester v. Baggess*, pl. 1. p. 98.

6. See *Attachment*; and *Wilson v. Davison* pl. 1. p. 178.

7. The condition of a Bond being "whereas the obligor did lend to J. W., \$2500 of the obligee's money; and the said J. W., having failed, but, before he failed, paid \$ 500: and whereas the said obligor hath instituted a suit against said J. W. for the recovery of said money; now if the said obligor shall pay the whole sum so lent, if it can be recovered from the said J. W., or, in case it cannot be wholly recovered, will lose the one half of that sum which cannot be recovered, then the above

obligation shall be void, otherwise to remain in full force and virtue;" a plea stating, "that he the said obligor could not recover of J. W. or his endorser the sum of money in the said condition mentioned, or any part thereof; and that he paid to the obligee one half of the sum which could not be so recovered, and the further sum of five hundred dollars," is a good and sufficient plea in bar to an action upon the Bond; without any farther averment, that the said obligor had used due diligence in prosecuting the suit against J. W.; and without stating what measures he had taken to recover the money or who the endorser was. *Cooke v. Graham's adm'r.* pl. 1. p. 172.

8. In debt on a Bond with condition to perform an award, to be made by certain arbitrators; the condition being made part of the record by *oyer*; and the defendant having pleaded "conditions performed," the plaintiff may set forth the award, and aver a breach of the condition, by a special replication; not having done so in his declaration; but, if he neglect to do this, and reply generally, Judgment ought to be arrested after a Verdict in his favor. *Green v. Bailey*, pl. 1. p. 246.
9. In such case, the proceedings subsequent to the plea should be set aside, and a Repleader awarded. *Ibid.* pl. 2.
10. After issue joined, and the cause set for hearing, the defendant in Chancery may be permitted, for good cause shown, to amend his answer and to plead the statutes of frauds and limitations. *Jackson's assignees v. Culright and Clark*, pl. 1. p. 208.
11. A mistake of the defendant's counsel, in advising him that he could avail himself of the defence without pleading, is sufficient ground for leave to file the pleas in addition to the answer. *Ibid.* pl. 2.
12. Though private Acts of Assembly may be given in evidence, without being specially pleaded, they are not to be taken notice of, judicially, by the Court, as public Acts are, but must be exhibited as documents, if not admitted by consent of parties. *Legrand v. Hampden Sidney College*, pl. 1. p. 324.
13. See *Purchaser*; and *Hook's Administrators v. Hancock*, pl. 1. p. 546.
14. See *Partnership*; and *Shields v. Oney*, pl. 1. p. 550.

### PLEDGE.

1. In what case, land is to be considered as a pledge liable to raise by sale the money due, or so much thereof as it may be adequate to produce; the surplus, if any, to enure to the benefit of the debtor. *Williams v. Price*, pl. 4 and 5. p. 507.
2. In the event of such debtor's inability to comply with his contract, he may relinquish his eventual interest in such surplus, and give up the land in absolute property to his credi-

tor, thereby exonerating himself from the debt. And, if the conveyance of the land to the debtor has not been completed, it is unnecessary, in the event of such surrender, to go on and perfect the same, but, instead thereof, the contract for such conveyance should be annulled. *Ibid.* pl. 6.

### POSSESSION.

1. If it be stated in a Bill of Exceptions, upon a trial in Ejectment, that the Testator of the defendant departed this life in possession of the land, which possession he had held "adverse to the lessor of the plaintiff," for a specified time; it must be understood that such possession was adverse to those under whom the lessor of the plaintiff claimed; especially, if it appear, from another bill of exceptions in the same trial, that the title of the lessor of the plaintiff did not commence until after the death of the said Testator. *Bream v. Cooper's heirs*, pl. 1. p. 7.
2. If it appear from the record in ejectment, that the defendant, or his Testator, had adverse possession of the land, at a time when a Deed of Trust, under which the plaintiff claims, was executed, judgment ought to be rendered for the defendant, although the nature of his title does not appear. *Ibid.* pl. 2. See *Sale*; and *Hewitt & Co. v. Davis and Chalmers*, pl. 1. p. 34.
3. Although, in the case of an absolute deed of slaves where the grantor remains in possession after the execution and recording of the same, such deed is to be regarded as fraudulent and void as to creditors and subsequent purchasers, yet the same is obligatory, and cannot be impeached, as between the grantor and grantee and their representatives. *Thomas v. Syper*, pl. 1. p. 28.
5. A Deed of Trust, if not revocable by the grantor, is not to be considered a Will in disguise, on the ground that nearly all his personal estate is thereby conveyed, and that he reserves to himself the possession and control of the property during his life. *Lightfoot's Ex'ors and others v. Colgin and Wife*, pl. 2. p. 42.
6. See *Equity*; and *Royall's Administrators v. Royall's Administrator*, pl. 2. p. 82.
7. Five years peaceable and uninterrupted possession of slaves, under a loan not evidenced by deed duly recorded, vests a title in the loanee, which enures in favour of his creditors, and cannot be devested, as to them, by his returning the same to the lender after the said five years have expired. *Garth's Ex'ors. v. Barksdale*, pl. 1. p. 101.
8. Under the circumstances of this case, one of the persons entitled to partition having been in possession and enjoyment of the whole land for many years, through want of knowledge of the title of the other partners, to whom he made their title known immediately

- after it was discovered by himself; upon a bill filed by them for partition, it was considered equitable that he should account for their proportion of the rents received by him, deducting his disbursements for securing the title; that all the leases, and agreements of lease, he had made of the land, should be acquiesced in by the plaintiffs; and that, for a part which he had sold, he should pay the price received with interest from the time of the sale, the time when he received it not appearing to be different from that of the sale. *Carter's Ex'ors. v. Carter & others*, pl. 2. p. 223.
9. *A. f. fa.* against the estate of the Testator, cannot lawfully be levied on slaves, which, being specifically bequeathed, are in possession of the *legatees* as their property, either by actual delivery from the executor or by his permission. *Sampson v. Bryce*, pl. 1. p. 175.
10. In such case a Court of Equity may award an injunction to prevent the sale of the property. *Ibid.* pl. 2.
11. A purchaser, having taken possession of the estate, is not entitled to relief in equity, against a Judgment for the purchase money, on the ground that the title of the vendor is not clearly shown to be good; but is bound, on his part, to prove it bad. *Grantland v. Wight Ex'or., &c.* pl. 1. p. 295.
12. A demand of slaves by the lender, who thereupon receives and immediately redelivers them to the loanee, to be held on the same terms as before, (such demand, receipt, and redelivery being in private,) is not sufficient to bar the rights of creditors, under the Act to prevent frauds and perjuries. *Boyd and Snepson and others v. Stainback & others*, pl. 1. p. 305.
13. A loan of slaves, though not declared by deed in writing duly recorded and therefore void as to creditors, (the loanee having continued in possession five years without such demand as would bar their right,) is nevertheless effectual between the parties and their representatives. If, therefore, the loanee die in possession of such slaves, they are not to be considered assets belonging to his estate, nor can be recovered as such, being liable to his creditors, so far as their claims remain unsatisfied by the assets in the hands of his executor or administrator, but no farther. *Ibid.* pl. 2.
14. In such case, if the assets be deficient, a Court of Equity will give the creditors relief, on a bill in their behalf against the lender and the executor or administrator of the loanee; making the assets liable in the first place, so far as they extend; after which, it will allow the lender a limited time to make good the deficiency, and, in default thereof direct a sale of the slaves. *Ibid.* pl. 3.
15. *Quare*, whether an execution can legally be levied on property, the possession of which has passed from the debtor, and remained in a third person, for more than five years, in pursuance of a deed said to be fraudulent, but regularly recorded, and importing on its face to be for a valuable consideration; before such deed has been impeached and convicted of fraud by the decree of a Court of competent jurisdiction? *Lawrence v. Swanson and others*, pl. 1. p. 332.
16. In a contract for sale of land, if no day be specified for delivering the deed and possession of the land, but the money be payable after delivery of the deed; it must be understood that the deed is to be delivered and possession given without delay. If therefore, (in consequence of a misunderstanding between the parties in relation to the terms of the sale) this be not done, the vendor is bound to account for and pay the profits of the land received by him after the contract; and the vendee to pay interest on the money, from the time when it would have been payable if the deed had been immediately delivered. *Hurdley v. Lyons*, pl. 2. p. 342.
17. If it be proved, on a trial in ejectment, that the father of the lessor of the plaintiff, who devised the land to him, was in possession thereof many years before and until his death; and that the lessor of the plaintiff afterwards conveyed it to a person, who was in possession at the time of his death; the Jury may presume that the lessor of the plaintiff was in possession from the death of his father to the date of such conveyance, if it be not proved that some other person in the mean time had the possession. *Moore v. Gilliam*, pl. 4. p. 346.
18. In ejectment, if it appear from the evidence that the land in controversy was vacant, when the defendant came to the possession of it, peaceably and quietly, without any privy between him and the lessors of the plaintiff, or those under whom they claim; the plaintiff can not recover upon the ground of the prior possession of the lessors, without proving twenty years uninterrupted adverse possession on their part, or on the part of those under whom they claim, or shewing a right to the possession by the death and reisin, in the manner prescribed by the Act of Assembly, of some person under whom they claim. *Moody v. M'Kim*, pl. 1. p. 374.
19. If a slave conveyed by Deed of Trust, to secure the payment of a debt, be permitted to remain in the debtor's possession, who, thereupon, by an agent, sends him out of the State, and sells him, such agent, not having actual notice of the lien on the slave before he pays over the money to his principal, is not responsible to the trustee, or the creditor; notwithstanding the deed was duly recorded. *Travis v. Claiborne*, pl. 1. p. 435.
20. In an action of slander, for saying of the plaintiff "that he had taken the defendant's slave, and that the defendant would have

him sent to the Penitentiary for it;" the plea being *justification*, "because the plaintiff did take a certain female slave, the property of the defendant, out of his possession, in such manner and with such intention as would subject him to such punishment;" to which the plaintiff replied *generally*, and issue was thereupon joined; it was decided, that, to support this plea of justification, it was sufficient for the defendant to shew that the slave, so averred to be his property, had been a long time in his possession as his slave, and was purchased by him as such; notwithstanding the pendency of a suit at that time in her behalf for freedom; for, if her right to freedom could be inquired into in this action, an issue thereupon ought to have been tendered by the plaintiff, whereby the defendant might have known to what point to apply his evidence. *Hook's Adm'rs. v. Hancock*, pl. 1. p. 546.

### POWER.

1. See *Lands*; and *Granland v. Wight, Ex'or.* &c., pl. 2. p. 295.

### PRACTICE.

1. See *Pleading*, No. 3.; and *Jones v. Stevenson*, pl. 3. p. 1.
2. Whenever there is an issue in fact, and also a demurrer, the demurrer ought regularly first to be decided; but an irregularity in this respect is not sufficient to reverse a Judgment to which there is no other objection. *Ibid.* pl. 4.
3. If the case be clear against the party tendering a demurrer to evidence, the Court may refuse to compel the other party to join. *Dunbar v. Beale*, pl. 1. p. 24.
4. After a *Distingas* upon a Judgment in detinue has been returned executed, but without satisfaction; if the Court, on the plaintiff's motion, direct the *Distingas* to be superseded, so far as it related to the specific property and to be executed as to the alternative value; such order is not erroneous; but, it seems, the plaintiff may have a new *Distingas* to be executed as to such value. *Garland v. Bugg*, pl. 1. p. 186.
5. It is not necessary to state the reasons of such order on its face; because it will be presumed to be correct unless the contrary appears. *Ibid.* pl. 2.
6. After the *Distingas* upon a judgment in detinue has been executed without satisfaction, superseded as to the specific property, and directed to be executed as to the alternative value; if it appear to the Court that, in consequence of the defendant's persisting in withholding the specific property, the plaintiff cannot get it by the *Distingas*; a *ca. sa.* or *fi. fa.* may be directed to be issued, for the alternative value. *Ibid.* pl. 3.

7. Notice of a motion to supersede a *Distingas*, or for a *ca. sa.* or *fi. fa.* in lieu thereof, need not be given by the plaintiff to the defendant. *Ibid.* pl. 4.

### PRESUMPTION.

1. See *Possession*; and *Moore v. Gilliam*, pl. 4. p. 346.
2. The right of freedom *prima facie* acquired by a slave imported into this state, subsequent to the year 1786, could only be obviated by evidence adduced to shew, or by circumstances authorizing a presumption, that the oath required by law had been taken by the importer. *Gernett v. Sam and Phillis*, pl. 2. p. 642.

### PRINCIPAL.

1. A Bond for prosecuting a Writ of *Superseas*, being executed by a surety only, without any principal obligor, is insufficient; and a *superseas* issued thereupon ought to be quashed. *Miller v. Blannerhasset*, pl. 1. p. 197.
2. An agent endorsing a note for the benefit of his principal, who assures him that he shall not be held responsible, ought not to be compelled to pay the money at the suit of a person to whom the note is endorsed, with notice of such equity; but the decree should be against the principal. And it seems, if the endorsee had no such notice, yet, if the principal be solvent, the decree ought still to be against him in the first place. *Chalmers Jones and Co. v. M'Murdo*, pl. 4. p. 262.

### PROCESS.

1. The several Superior Courts of Chancery have jurisdiction in causes where their process is served upon the defendant, within their respective districts; though his place of residence, and also the land in controversy, be in a different district. *Hughes v. Hall*, pl. 1. p. 431.

### PROFITS.

1. See *Remainder*; and *Medley v. Jones*, pl. 2. p. 98.
2. It seems that, according to the common law, still in force in Virginia, the plaintiff in detinue is not entitled to the issues of the defendant's land, or other property, received by the Sheriff upon the *Distingas*. *Garland v. Bugg*, pl. 5. p. 166.
3. See *Lands*; and *Hundley v. Lyons*, pl. 2. p. 342.
4. See *Trust*; and *Southgate v. Taylor*, pl. 1. p. 420.
5. When a person, who bought a slave with lawful notice of a better title, is deposed to



deliver him and pay profits; interest ought to be charged against him, upon the *lives* actually received by him from other persons, from the dates of his receipts, but not upon the profits of such slave while in his own possession without being hired; the same being unliquidated, and merely conjectural sums, and which he was in no default in not paying. *Baird v. Bland and others*, pl. 1. p. 492.

### PROMISE.

1. In the action of assumpsit, if no consideration for the promise be laid in the declaration, judgment ought to be arrested, notwithstanding it be founded on a written agreement. *Mosely v. Jones*, pl. 1 p. 23.
2. What evidence is sufficient to establish an acknowledgment of, and promise to pay a debt by account. *Dunbar v. Beale*, pl. 2. p. 24.
3. See *Sale*; and *Stone v. Pointer*, pl. 2. p. 287.

### PROMISSORY NOTE.

1. On a Bill exhibited by the holder of a promissory note against the maker and all the endorsers; to avoid circuity of action, the Court of Equity may fix the debt on the person *first responsible*. *Chalmers, Jones and Co v. M'Murdo*, pl. 1 p. 252.
2. The first endorser of a note in point of time is not, of course, *first responsible*. *Ibid.* pl. 2.
3. If the payee of a note write his name over that of a person, who endorsed it in blank, but refused to do so except upon the ground of the responsibility of the payee as *first endorser*; he thereby makes himself responsible, *as such*, in point of contract. *Ibid.* pl. 3.
4. An agent, endorsing a note for the benefit of his principal, who assures him that he shall not be held responsible, ought not to be compelled to pay the money at the suit of a person to whom the note is endorsed, with notice of such equity, but the decree should be against the principal. And it seems if the endorsee had no such notice, yet, if the principal be solvent, the decree ought still to be against him in the first place. *Ibid.* pl. 4.
5. If a promissory note, negotiable at bank, be made and endorsed, for the purpose only of obtaining accommodation for the maker, and, being left by him with a second endorser to be lodged in the bank for discount, be fraudulently put into circulation by such second endorser, to raise money thereupon for his own use; a third endorser, knowing nothing of such fraud, may cause the note, (if lodged in the bank for collection, and not paid when due,) to be protested as to the

maker and prior endorsers, *pay it himself*, and thereupon maintain his action against the maker and first endorser, notwithstanding no valuable consideration passed, or was contracted for, between him and the second endorser, but he made the endorsement merely from the motive of enabling such second endorser to get the note discounted at the bank. *Robertson and Co v. Williams and Smith*, pl. 1. p. 381.

6. In an action by the assignee against the maker of a promissory note, the defendant cannot set off against it a bill of exchange for which the assignor is responsible, unless it appear that such bill was his property before he received notice of the assignment. *Ritchie and Wales v. Moore*, pl. 3. p. 388.

### PROTEST.

1. A bill of exchange does not lose its negotiable character by being protested; but, after protest, may be assigned, or transferred without assignment. *Ritchie and Wales v. Moore*, pl. 2. p. 388.

### PUBLICATION.

1. It seems, that the testimony of the editor of a newspaper, that he inserted therein, the requisite number of times, an advertisement, the purport of which he states on oath, is sufficient proof of such publication, on a trial in ejectment, without producing the advertisement itself. *Moore v. Gilliam*, pl. 3. p. 348.

### PURCHASE.

1. A purchase, by an executor or administrator of any part of the estate of his Testator or intestate, when other persons were deterred from bidding in consequence of doubts, concerning the title, suggested by himself, whereby he obtained the property for less than its value, ought to be annulled by a Court of Equity. *Hudson and others v. Hudson's Administrator*, pl. 3. p. 180.
2. The addition of a codicil to a Will is not sufficient to operate as a devise of lands purchased by the Testator between the date of the Will and the date of the codicil; there being no words in the codicil indicating such to be the intention of the Testator. *Kendall's Ex'or. &c. v. Kendall, &c.* pl. 1. p. 275.

### PURCHASE MONEY.

1. It seems, that payment of the purchase money is not sufficient part performance of a verbal contract for land, to take it out of the

statute of frauds. *Jackson's Assignee v. Cutright and Clark*, pl. 3 p. 308.

2. On a bill for specific performance exhibited by the devisee of the purchaser, the Court, in decreeing the conveyance, ought to reserve to the vendor a lien on the land to secure the payment of the purchase money. *Hundley v. Lyons*, pl. 4. p. 342.
3. It seems, that, where the purchase money for land which the vendor has conveyed with warranty, has not been fully paid; and the purchaser comes into equity for an abatement or discount, from the sum remaining due, on account of a loss by an eviction of part of the land; he should be allowed the value of the land lost, at the time of the purchase, and not at the time of the eviction. *Crenshaw v. Smith and Co.*, pl. 1. p. 415.
4. A stipulation that the property purchased shall be the only security for payment of the purchase money, in exoneration of the person and other property of the purchaser, is not repugnant, but valid and obligatory on the parties. *Williams v. Price*, pl. 4. p. 507.
5. In such case the land is to be considered as a pledge, liable to raise by sale the money due, or so much thereof as it may be adequate to produce; the surplus, if any, to enure to the benefit of the debtor. *Ibid.* pl. 5.
6. In the event of such debtor's inability to comply with his contract, he may relinquish his eventual interest in such surplus, and give up the land in absolute property to his creditor; thereby exonerating himself from the debt. And if the conveyance of the land to the debtor has not been completed, it is unnecessary, in the event of such surrender, to go on and perfect the same; but instead thereof, the contract for such conveyance should be annulled. *Ibid.* pl. 6.
7. It seems just, however, that the property purchased should be considered liable for the purchase money; especially, in a case in which a personal exemption of the purchaser has been stipulated; and where the parties themselves, by their subsequent acts, appear to have expounded the contract in that sense. *Ibid.* pl. 9.
8. If personal property, consisting of perishable articles, provisions, raw materials for manufacture, implements necessary for a furnace, &c. be pledged, together with the furnace and land for payment of the purchase money; the lien is not to be construed so strictly as to tie up the property from use; nor that even the same kind and amount of property shall be forthcoming in future, without a stipulation to that effect: but the purchaser is bound to make good only such waste thereof as shall have arisen from his fraud, wilful default or misconduct, and to give up what remains on hand when he surrenders the property in satisfaction of the debt. *Ibid.* pl. 10.

# PURCHASER.

1. See *Possession*; and *Thomas v. Soper*, pl. 1. p. 28.
2. A purchaser of land, suing for breach of a contract to make a good title may with propriety come into a Court of Equity for pecuniary compensation, instead of proceeding at law in the first instance, if the vendor has conveyed away his property in trust, whereby there might be a difficulty in obtaining satisfaction of his judgment when recovered; the vendor, or his lawful representatives, together with the trustees and cestuys que trusts being made defendants to the Bill. *Sim's Administrator v. Lewis's Executor and others*, pl. 1. p. 29.
3. See *Trust*; (*Deed of*.) and *Williamson v. Gordon's Ex'ors* pl. 1 p. 257.
4. A purchaser, having taken possession of the estate, is not entitled to relief in equity against a judgment for the purchase money, on the ground that the title of the vendor is not clearly shewn to be good; but is bound, on his part, to prove it *bad*. *Grantland v. Wight Ex'or. &c.* pl. 1. p. 295.
5. See *Trust*; and *Moore v. Gilliam*, pl. 2. p. 346.
6. If the mortgagee of a slave recover him in detinue, against a person claiming under a bona fide purchaser from the mortgagor, equity will consider such person as standing in the place of the mortgagor, and entitled to redeem the slave by paying the debt. *Dust v. Conrad and others*, pl. 3 p. 415.
7. It will also, at the same time, (to make an end of the controversy,) give him relief against the mortgagor, who sold the slave with warranty of the title. *Ibid.* pl. 4.
8. In such case, the right of the derivative purchaser to redeem the slave, and to relief against the mortgagor, who improperly sold him, is not affected by his having submitted to arbitration the suit brought against him by the mortgagee. *Ibid.* pl. 5.
9. When a person, who bought a slave with lawful notice of a better title, is decreed to deliver him and pay profits; Interest ought to be charged against him, upon the hires actually received by him from other persons, from the dates of his receipts; but not upon the profits of such slave while in his own possession without being hired; the same being unliquidated and merely conjectural sums, and which he was in no default in not paying. *Baird v. Bland and others*, pl. 1. p. 492.
10. Where a purchaser, having his election to restore certain articles of personal property, makes an offer to do so, which the vendor refuses to accept, the purchaser is not thereafter responsible for any waste or damage the property may sustain, without his wilful misconduct. *Williams v. Price*, pl. 11. p. 507.

11. Under what circumstances, a purchaser, having his election to restore the property, is not disabled, in equity, from availing himself of such right by his having made a lease thereof. *Ibid.* pl. 12.
12. See *Possession*; and *Hook's Administrators v. Hancock*, pl. 1. p. 546.
2. See *Penalty*; and *Tennant's Executor v. Gray*, pl. 2. p. 494.

## RELIEF.

1. A bill for relief against a writing purporting an acknowledgment of a gift of property by the complainant to the defendant, on the ground of its having been obtained by fraud, presents a proper case for equitable jurisdiction, though a suit at law, founded upon such writing, might be defeated without coming into equity. *Johnson v. Hendley*, pl. 1. p. 219.
2. See *Possession*; and *Grandland v. Wight Executor*, &c. pl. 1. p. 295.

## R

## RECORD.

1. The clerk's stating in the transcript of the record, that certain answers which are filed, and copied in such transcript, were not noticed by the Court, is not to be relied upon by the Appellate Court, if the contrary may be inferred from the decree itself. *Pickett and Wife v. Chillon*, pl. 2. p. 467.
2. In a suit for freedom, the validity of a will, under which the plaintiff claims, ought not to be questioned; the same, (or a copy thereof, the original being destroyed,) having been admitted to record, as and for the last Will of the Testator, by the proper Court, whose judgment remains unappealed from, and the validity of such Will not contested by bill in equity. *Lemon v. Reynolds Administrator of Holmes*, pl. 1. p. 552.
1. See *Waiver*; and *Ligon v. Ford*, pl. 1. p. 10.
2. See *Sale*; and *Howatt and Co. v. Davis and Chalmers*, pl. 3. p. 34.
3. See *Case Agreed*; and *Royall's Administrators v. Royall's Administrator*, pl. 1. p. 82.
4. See *Waiver*; and *Medley v. Jones*, pl. 1. p. 98.

## RELINQUISHMENT.

## REMAINDER.

1. A mortgage being attested by one witness only, and therefore defective, (see I R. C. ch. 80 § 1 and 4. p. 157;) yet, if the mortgagee has recovered upon it at law, a Court of Equity will not regard the defect. *Dust v. Conrod and others*, pl. 2. p. 411.
1. See *Purchaser*; and *Dust v. Conrod and others*, pl. 3. p. 411.
1. If, pending a suit, the parties, by an order of Court, refer the matter in controversy to arbitrators, whose award is to be made the Judgment of the Court; and, afterwards, by an agreement under seal, appoint a substitute for one of them, agreeing that an award, to be made by the remaining referees, and such substitute, shall be entered as the Judgment of the Court; such award may be entered without any previous order of Court confirming the appointment of such substitute. *Manlove v. Thrift*, pl. 1. p. 493.
1. A person entitled to a remainder in fee, expectant upon a life estate in slaves, taking them into his own possession to prevent the tenant for life from carrying them out of the state, is bound to account for and pay their hire or profits, while he detains them; and is not entitled, upon the ground of the tenant's refusing to give bond and security for their production at the expiration of the life estate, to an injunction to stay proceedings upon a Judgment against him for such hire or profits. *Medley v. Jones*, pl. 2. p. 98.
2. A Testator gave to his son W. a tract of land during his natural life, and then to his heirs lawfully begotten of his body, "that is, born at the time of his death, or nine Calendar months thereafter;" and, for want of such heirs, then, to his son I's two sons Jacob and George; one of them to set a price on the whole of it, and give or receive one half of that sum from the other." This was a good limitation by way of remainder, to Jacob and George. *Warners v. Mann*, pl. 1. p. 242.

## RENTS.

1. See *Sale*; and *Legrand v. Hampden Sidney College*, pl. 4. p. 324.
1. Though interest ought not to be given, as of course, in actions for the recovery of rent in arrear, it may nevertheless be given under circumstances, to be judged of by the Jury, and, in case of a general verdict, it shall be intended that sufficient circumstances existed

## RELEASE.

to justify the allowance thereof. *Don v. Adams's Administrators*, pl. 1. p. 21.

2. But if the Jury state the circumstances in a special verdict, the Court should disallow the interest, if, under those circumstances, it ought not to be allowed. *Ibid.* pl. 2.
3. Interest on rents in arrear ought not to be allowed; the circumstances being that there always were effects on the premises, liable to distress, sufficient to have satisfied the rents, which were not paid, though demanded by the landlord. *Ibid.* pl. 3.
4. See *Lands*; and *Hundley v. Lyons*, pl. 3. p. 342.

### REPAIRS.

1. See *Widow*; and *Hudson and others v. Hudson's Administrator*, pl. 1. p. 180.

### REPLEADER.

1. See *Pleading*; and *Beatty v. Smith and others*, pl. 1. p. 39.
2. If the count, upon a Writ of Right, be in behalf of two demandants, a plea opposing the claim of one, without mentioning that of the other, is defective; and if, without any replication by the demandants, a verdict be found and Judgment be rendered in their favour, such judgment must be reversed, and all the proceedings subsequent to the count set aside. *Chichester v. Boggess*, pl. 1. p. 98.
3. In debt on a Bond, with condition to perform an award to be made by certain arbitrators; the condition being made a part of the record by *oyer*, and the defendant having pleaded "conditions performed," the plaintiff may set forth the award and aver a breach of the condition by a special replication; not having done so in his declaration: but, if he neglect to do this, and reply generally, judgment ought to be arrested after a verdict in his favour. *Green v. Bailey*, pl. 1. p. 246.
4. In such case, the proceedings subsequent to the plea, should be set aside, and a *repleader* awarded. *Ibid.* pl. 2.

### REPLICATION.

1. See *Pleading*; and *Jones v. Stevenson*, pl. 2. p. 1.
2. *Quare*, whether it is competent to the plaintiff, in any action other than *replevin*, to tender an issue in fact by a replication, and an issue in law by a demurrer, to the same plea? *Ibid.* pl. 3. p. 1.
3. In debt on a Bond, with condition to perform an award to be made by certain arbitrators, the condition being made a part of the record by *oyer*, and the defendant having pleaded "conditions performed," the plaintiff

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may set forth the award, and aver a breach of the condition by a special replication; not having done so in his declaration: but, if he neglect to do this, and reply generally, Judgment ought to be arrested after a verdict in his favour. *Green v. Bailey*, pl. 1. p. 246.

4. The only effect of the omission of a replication to an answer is that all the facts stated in such answer are admitted. *Pickell and Wife v. Chillon*, pl. 4. p. 467.

### REPRESENTATIVES.

1. See *Residuum*; and *Hays's Ex'ors. and others v. Hays and others*, pl. 1. p. 418.

### REQUISITIONS.

1. See *Mutual Assurance Society against Fire*; and *Greenham Agent for the Mutual Assurance Society v. Buck*, pl. 1. p. 263.

### RESIDUUM.

1. A Bill in Equity in behalf of persons, suing as "children" of a deceased residuary legatee, for his share of the *residuum*, cannot be sustained; it should appear that the plaintiffs are the administrators, or other legal representatives, of such legatee. *Hays's Executor and others v. Hays and others*, pl. 1. p. 418.

### RETURN.

1. See *Scire Facias*; and *Lee and Fitch v. Chillon*, pl. 1. and 2. p. 407.

### REVERSAL.

1. See *Uncertainty*; and *Birchall and others v. Bolling*, pl. 3. p. 442.
2. See *Infant*; and *Pickell & Wife v. Chillon*, pl. 5. p. 467.

### REVERSAL OF JUDGMENT.

1. See *Practice*; and *Jones v. Stevenson*, pl. 4. p. 1.

### RIGHT, (WRIT OF.)

1. If the count upon a Writ of Right be in behalf of two demandants, a plea opposing the claim of one, without mentioning that of the other, is defective; and if, without any replication by the demandants, a verdict be found, and Judgment rendered in their favour, such Judgment must be reversed, and all the proceedings subsequent to the count, set aside. *Chichester v. Boggess*, p. 98.

## S

## SALE.

1. In case of a sale of personal property, not executed by delivery, but to be consummated by delivery at another place; although in consequence of earnest paid, or otherwise, the property be so vested in the buyer, that, on complying, or offering to comply with the contract on his part, he may recover the same from the seller or his agent; yet, until delivery, and while the goods are (in legal phrase,) *in transitu*, the seller may, on the buyer's becoming bankrupt, or being likely to be so, arrest the goods, or order his agent to arrest them; which order, operating as an indemnity to the agent, in addition to that arising from his possession of the goods, will be his guarantee for refusing to deliver them; and, perhaps, under circumstances, the agent would also have a right to demand other security from his principal, which it would be incumbent on him forthwith to give, under pain of a right in the agent to go on, and execute the contract by a delivery. *Hewitt & Co. v. Davis & Chalmers*, pl. 1. p. 34.
2. If a factor, or agent, having sold goods belonging to his principal, be ordered by him, while they are yet *in transitu*, not to deliver them to the buyer, of whose solvency doubts are entertained, and he deliver them notwithstanding such order, and without demanding any security for his indemnity; the principal is entitled to an action against him, in case the buyer should prove insolvent. *Ibid.* pl. 2.
3. And such right of action is not waived or abandoned by expressions used in letters from the principal, after the delivery of the goods, serving to import an agreement to look to the buyer for payment, and not to the factor; nor by the principal's permitting considerable time to elapse before he informs the factor, categorically, that he will look to him, and not to the buyer for satisfaction; provided such expressions, and such delay, on the part of the principal, may have been occasioned by the factor's failing to make a full and fair disclosure of all facts and circumstances necessary to enable the principal to decide upon the subject, and which it was the duty, and in the power of the factor to have given. *Ibid.* pl. 3.
4. See *Wills*; and *The Commonwealth v. Martin's Executors and Devises*, pl. 1. p. 117.
5. See *Wills*; and *The Commonwealth v. Sedden & Seddon*, pl. 1 p. 160.
6. If an executor or administrator sell the slaves of his testator or intestate, by *private contract*, for ready money, he ought to be charged therefor, such sum as they would have sold for upon a reasonable credit, if the situation of the estate would admit of such credit; and, if not, such a sum as they would have sold for in cash, at public auction. *Hudson and others v. Hudson's adm'r.*, pl. 2. p. 189.
7. See *Purchase*; and *Ibid.* pl. 3.
8. That slaves were sold on a credit for more than a sum which the seller had previously offered to take for them in cash, with interest thereon, during the term of credit, and that the seller was accustomed to lend money on usurious interest, is not sufficient evidence that such sale was intended as a cover for usury; there being no proof that a loan of money was intended by the parties. *West v. Belches*, pl. 1. p. 187.
9. An injunction of a Court of Chancery inhibiting the defendants and all other persons, from selling certain slaves until the farther order of the Court, is conclusive, while in force, to prevent their being lawfully sold to satisfy an execution against him, even in favour of a person not a party to the suit in Chancery. *Ibid.* pl. 2.
10. A Testator's directing all his just debts to be paid, out of the sales of certain lands, does not authorize the payment of a gaming debt of his out of the proceeds of such sales. *Carter's Ex'ors. v. Cutting and Wife*, pl. 1. p. 223.
11. Under the Act of Assembly concerning sheriffs, (Rev'd. Code, 2d vol. p. 160,) the sheriff having received the bond of indemnity, is bound to sell the property taken in execution, whether it belongs to the debtor or not. *Stone v. Pointer*, pl. 1. p. 287.
12. In such case, there is no implied warranty by the sheriff of the title to the property sold, nor implied promise to refund the purchase money, if the buyer be evicted. *Ibid.* pl. 2.
13. An Executor selling the land of his Testator, by virtue of a power given by the Will, is not bound to convey with general warranty, without an agreement to that effect; but only with special warranty against himself and all persons claiming under him, notwithstanding a written agreement, after the sale, that he would make a good and indefeasible title to the purchaser; for such agreement is to be understood in reference to the term of the sale. *Grunt'nd v. Wight Ex'or &c.* pl. 2 p. 236.
14. See *Security*; and *Wilson. &c. v. Graham's Ex'ors &c.* pl. 1 p. 297.
15. See *Slaves*; and *Boyd and Simpson v. Steinback and others*, pl. 3 p. 305.
16. A written agreement for sale of the lands of a Corporation, though not with the common seal affixed, may be enforced in equity. *Le-grand v. Hampden Sidney College*, pl. 3 p. 324.
17. In a written agreement for sale of land, it was described as a tract which had *extorted* to the Commonwealth, and by the Commonwealth had been given to the vendor, who stipulated to make compensation, if a better title than his should thereafter be established. The title of the vendor appearing to be such as described, on a bill in his behalf for specific

- performance, the purchaser was not allowed compensation for locating and obtaining a patent for part of the land *as waste and unappropriated*, but was decreed to release the claim under the patent, before the vendor should be compelled to make him a deed; and a stipulation, conforming to the agreement, was directed to be inserted in such deed. *Ibid.* pl. 4.
18. Whenever it does not clearly appear that the land was sold by the tract, and not by the acre, the vendee ought to be responsible for the value of the surplus land found in the tract; and if no circumstances appear to give a different rule, such value is to be estimated by the average value, per acre, of the whole purchase. *Hundley v. Lyons*, pl. 1. p. 342.
19. In a contract for sale of land, if no day be specified for delivering the deed and possession of the land, but the money be payable after delivery of the deed; it must be understood that the deed is to be delivered, and possession given *without delay*. If, therefore, (in consequence of a misunderstanding between the parties in relation to the terms of the sale,) this be not done, the vendor is bound to account for and pay the profits of the land received by him after the contract, and the vendee to pay interest on the money, from the time when it would have been payable if the deed had been immediately delivered. *Ibid.* pl. 2.
20. In such case, in a decree for specific performance, liberty should be reserved to the vendee to use the name of the vendor to recover rents, in arrear, from lessees of the land, which became due between the date of the contract and the delivery of the deed. *Ibid.* pl. 3.
21. If an agreement for sale of land be made subject to a condition, that the price thereof shall afterwards be ascertained by the parties; and one of the parties die, without agreeing upon the price, such agreement is too incomplete and uncertain to be carried into execution by a Court of Equity. *Graham v. Call Ex'or. of Means*, pl. 1. p. 396.
22. See *Trust*; and *Southgate v. Taylor*, pl. 1. p. 420.
23. A sale of mortgaged land by commissioners in Chancery ought to be set aside, and another decreed, upon its appearing to the Court that the highest bidder at such sale had previously agreed with a purchaser from the mortgagor, that he would allow such purchaser to redeem the land, within a limited time, by repaying him his money with interest; and that, such agreement being known at the sale, other persons were induced to refrain from bidding, and consequently the land was struck off to him at a price inferior to its value. *Wood's Ex'or. & Miller v. Hudson and others*, pl. 1. p. 420.
24. The Act of Assembly "concerning the sale of property under Executions and incumbrances," passed February 1st, 1808, (2 R. C. p. 158.) applied to a sale of mortgaged land by commissioners in Chancery, *after the first day of March, 1808*; notwithstanding the decree was pronounced, and the time limited for paying the money to redeem the land had elapsed, before the passage of that Act. *Ibid.* pl. 2.
25. If a slave, conveyed by Deed of Trust to secure the payment of a debt, be permitted to remain in the debtor's possession, who thereupon, by *av. agent*, sends him out of the state, and sells him, such agent, not having actual notice of the lien on the slave, before he pays over the money to his principal, is not responsible to the trustee or the creditor; notwithstanding the deed was duly recorded. *Travis v. Claiborne*, pl. 1. p. 435.
26. See *Interest*; and *Mayo v. Judah*, pl. 2. p. 495.
27. See *Security*; and *Williams v. Price*, pl. 5 and 6. p. 507.

# SATISFACTION.

1. See *Trust*, (*Deed of*); and *Sims's Adm'r. v. Lewis's Ex'or. and others*, pl. 1. p. 29.

# SCIRE FACIAS.

1. On a writ of *scire facias* against bail, a return by the sheriff that the defendant is *no inhabitant* of his bailiwick, and is not found within the same, is not a sufficient return of *nilhil*; but it should be stated, also, that he has nothing in the bailiwick by which he could be summoned. *Lee & Fitzhugh v. Chilton*, pl. 1. p. 407.
2. If two writs of *scire facias* be successively issued; the returns on which are both defective; and the defendant, after pleading specially, obtain leave to withdraw his plea, as having been improvidently pleaded; the Court ought not, thereupon, to permit the sheriff to amend both his returns, but only that on the first writ, quashing the second writ, and remanding the cause to the Rules for farther proceedings. *Ibid.* pl. 2.

# SECURITY.

1. To prevent circuitry of action, and attain the ends of natural justice, a Court of Equity will completely indemnify one of the sureties in a bond, by means of a lien on the property of the principal obligor existing in favour of the other surety; notwithstanding he has himself relinquished a lien on the same property, originally created for his indemnification. And, for this purpose, the Court will compel the creditor (all the parties interested being before it,) to resort to that property, in the first place for satisfaction of his debt. *West v. Belches*, pl. 3. p. 187.

2. A bond for prosecuting a writ of *Superseas* being executed by a surety only, without any principal obligor, is insufficient; and a *superseas* issued thereupon ought to be quashed. *Miller v. Blannerhasset*, pl. 1. p. 187.
3. See *Wills*; and *Carter's Ex'ors. v. Cutting and Wife*, pl. 5. p. 223.
4. A vendor of land, by executing a conveyance and taking bond and security for the purchase money, discharges the land from his equitable lien; even while it continues the property of the purchaser. *Wilson & others v. Graham's Ex'ors. &c.* pl. 1. p. 287.
5. A stipulation that the property purchased shall be the only security for payment of the purchase money, in exoneration of the person and other property of the purchaser, is not repugnant, but valid and obligatory on the parties. *Williams v. Price*, pl. 4. p. 607.
6. In such case, the land is to be considered as a pledge, liable to raise by sale the money due, or so much thereof as it may be adequate to produce the surplus, if any, to ensure to the benefit of the debtor. *Ibid.* pl. 5.
7. In the event of such debtor's inability to comply with his contract, he may relinquish his eventual interest in such surplus, and give up the land in absolute property to his creditor, thereby exonerating himself from the debt. And, if the conveyance of the land to the debtor has not been completed, it is unnecessary, in the event of such surrender, to go on and perfect the same, but instead thereof, the contract for such conveyance should be annulled. *Ibid.* pl. 6.
2. The Deputy Sheriff who sold the property under the Execution is not a competent witness, in an action in the name of the High Sheriff upon the Bond of indemnity, to prove that, in fact, the property was that of the person against whom the Execution issued. *Ibid.* pl. 2. p. 32.
3. Under the Act of Assembly concerning Sheriffs (Rev'd. Code, 2d Vol. p. 60) the Sheriff, having received the bond of indemnity, is bound to sell the property taken in Execution, whether it belongs to the debtor, or not. *Stone v. Pointer*, pl. 1. p. 287.
4. In such case, there is no implied warranty, by the Sheriff, of the title to the property sold, nor implied promise to refund the purchase money, if the buyer be evicted. *Ibid.* pl. 2.
5. It is sufficient evidence, in support of a motion by a High Sheriff against his deputy, to recover the amount of a Judgment rendered by a County Court, against the former, as having been obtained for the default and misconduct of the latter, if it be proved, by the Record, that appearance bail, taken by the Deputy Sheriff, was accepted to in the Clerk's Office, and, at the ensuing quarterly Court, without any decision by the Court as to the sufficiency of the bail, an officer judgment against the defendant and Sheriff was set aside, payment being pleaded in the name of the High Sheriff, after which a final Judgment was rendered by non cum informatus; and by the parol testimony of the Council, that he set aside the Office Judgment at the instance of the Deputy Sheriff, and had no communication with the High Sheriff during the pendency of the suit. *Stowers adm'r. of Bragg v. Smith's Executors*, pl. 1. p. 401.

## SERVANT.

1. See *Trespass*; and *Harris v. Nicholas*, pl. 4. p. 483.

## SET OFF.

1. In an action, by the assignee against the maker of a promissory note, the defendant cannot set off against it a Bill of Exchange for which the assignor is responsible, unless it appear that such Bill was his property before he received notice of the assignment. *Ritchie & Wales v. Moore*, pl. 3. p. 388.
2. In an action against a Mercantile Company a Set Off of a debt due to an individual partner cannot be allowed. *Ibid.* pl. 4.

## SHERIFFS.

1. By virtue of the Act of Assembly, concerning Sheriffs, passed the eighth day of February eighteen hundred and eight, any person claiming the property sold under an Execution may prosecute an action of debt on the Bond of indemnity, in the name of the Sheriff or other officer to whom it was taken, without proving that any damage has been sustained by such officer. *Carrington v. Anderson*, pl. 1. p. 32.

## SLANDER.

1. Whether, in an action for words, circumstances of suspicion, not amounting to full justification, may be proven in mitigation of damages. *Cheatwood v. Mayo*, pl. 1. p. 16.
2. In an action of slander, for saying of the plaintiff, "that he had taken the defendant's slave, and that the defendant would have him sent to the penitentiary for it;" the plea being justification, "because the plaintiff did take a certain female slave, the property of the defendant, out of his possession, in

- such manner and with such intention, as would subject him to such punishment;" to which the plaintiff replied generally, and issue was thereupon joined, it was decided, that, to support this plea of justification, it was sufficient for the defendant to shew that the slave, so averred to be his property, had been a long time in his possession as his slave, and was purchased by him as such, notwithstanding the pendency of a suit at that time in her behalf for freedom; for, if her right to free-lom could be inquired into in this action, an issue thereupon ought to have been tendered by the plaintiff, whereby the defendant might have known to what point to apply his evidence. *Hook's adm'r's. v. Hancock*, pl. 1. p. 546
3. *Quare*, whether, in an action of Slander, between A. & B, the right of C. to freedom can be collaterally investigated? *Ibid.* pl. 2.
  4. It is a sufficient ground of Equity for a perpetual Injunction to a Judgment in Slander, that, at the time of speaking the defamatory words, and when the Judgment was obtained, the complainant in the Bill (who was defendant at law) was insane, or in a state of partial mental derangement on the subject to which those words related. *Horner v. Marshall's adm'r.* pl. 1. p. 466.

# SLAVES.

1. Although in the case of an absolute Deed of slaves, where the grantor remains in possession after the Execution and recording of the same, such Deed is to be regarded, as fraudulent and void as to creditors and subsequent purchasers, yet the same is obligatory and cannot be impeached as between the grantor and grantee, and their representatives. *Thomas v. Soper*, pl. 1. p. 28.
2. A person entitled to a remainder in fee expectant upon a life estate in slaves, taking them into his own possession to prevent the tenant for life from carrying them out of the State, is bound to account for and pay their hire or profits while he detains them; and is not entitled, upon the ground of the tenant's refusing to give bond and security for their production at the expiration of the life estate, to an Injunction to stay proceedings upon a Judgment against him for such hire or profits. *Medley v. Jones*, pl. 2. p. 98.
3. Five years peaceable and uninterrupted possession of slaves, under a Loan not evidenced by Deed duly recorded, vests a title in the loanee which inures in favour of his creditors, and cannot be defeated, as to them, by his returning the same to the lender, after the said five years have expired. *Garth's executors v. Barksdale*, pl. 1. p. 101.
4. See *Legacy*; and *Scott & Wife v. Halliday and Hinton*, pl. 1. p. 103.

5. See *Possession*; and *Sampson v. Bryce*, pl. 1. p. 175.
6. If an Executor, or administrator sell the slaves of his Testator or intestate by private contract for ready money, he ought to be charged therefore such sum as they would have sold for upon a reasonable credit, if the situation of the estate would admit of such credit; and, if not, such a sum as they would have sold for, in cash, at public auction. *Hudson and others v. Hudson's adm'r.* pl. 2. p. 180.
7. See *Sale*; and *West v. Belcher*, pl. 1. and 2. p. 187.
8. A demand of slaves by the lender, who thereupon receives, and immediately redelivers them to the loanee, to be held on the same terms as before, (such demand, receipt, and redelivery being in private,) is not sufficient to bar the rights of creditors, under the Act to prevent fraud and perjuries. *Bayd and Simpson and others v. Stainback and others*, pl. 1. p. 305.
9. A Loan of slaves, though not declared by deed in writing duly recorded, and therefore void as to creditors, (the loanee having continued in possession five years without such demand as would bar their right,) is nevertheless effectual between the parties and their representatives. If, therefore, the loanee die in possession of such slaves, they are not to be considered assets belonging to his estate, nor can he recovered as such; being liable to his creditors, so far as their claims remain unsatisfied by the assets in the hands of his Executor or administrator, but no farther. *Ibid.* pl. 2.
10. In such case, if the assets be deficient, a Court of Equity will give the Creditors relief, on a bill, in their behalf, against the lender, and the Executor or administrator of the loanee; making the assets liable in the first place, so far as they extend; after which, it will allow the lender a limited time to make good the deficiency, and, in default thereof, direct a sale of the slaves. *Ibid.* pl. 3.
11. See *Equity*; and *Dust v. Conrad and others*, pl. 1. 3 and 4. p. 411.
12. See *Wills*; and *Merrymans v. Merryman and others*, pl. 1. p. 440.
13. A writing under seal being in these words; "for the hire of four negro fellows the present year, who are to be returned well clothed on or before the 25th. of December, I promise to pay, &c.;" *quare*, whether such writing contains a covenant to return the negroes, as well as to pay the money? *Harris v. Nicholas*, pl. 1. p. 483.
14. A Covenant by a person hiring a slave, to return him at the end of the year, is not to be considered as a covenant to ensure such return in the event of his death in the mean time; although it be occasioned by a cruel and excessive beating perpetrated by the



Overseer under whose superintendence he was put. *Ibid.* pl. 2.

15. *Quera*, whether an employer who continues in his service an Overseer noted for cruelty, may not be made liable, by an action upon the case, for the value of a hired negro whipped to death by such Overseer, though without any direction from him? *Ibid.* pl. 5.
16. When a person, who bought a slave with lawful notice of a better title is decreed to deliver him and pay profits; interest ought to be charged against him, upon the hires actually received by him from other persons, from the dates of his receipts; but not upon the profits of such slave while in his own possession without being hired, the same being unliquidated and merely conjectural sums, and which he was in no default in not paying. *Baird v. Bland* pl. 1. p. 492.
17. See *Freedom*; and *Garnett v. Sam & Phillis*, pl. 1. 2. and 3. p. 542.
18. See *Slender*; and *Hook's adm'r's v. Hancock*, pl. 1. p. 546.

#### SPECIFIC PERFORMANCE.

1. Where it appears that at the time of entering into a contract for sale of a tract of land, there was a misunderstanding between the parties, as to the identity of the land to which the contract related, a Court of Equity, in its discretion, ought not to interfere by decreeing a specific performance. *Graham v. Hendren*, pl. 1. p. 185.
2. Under what circumstances, in a suit in Equity for specific performance of an agreement for an exchange of lands, the Court may decree according to the prayer of the bill, without a reference to a commissioner of the plaintiff's title, though objected to by the defendant in his answer. *Stovall v. London*, pl. 1. p. 299.
3. See *Title*; and *Ibid.* pl. 2.
4. See *Sale*; and *Legrand v. Hampden Sidney College*, pl. 4. p. 324.
5. See *Ibid.*; and *Hundley v. Lyons*, pl. 3. p. 342.
6. On a bill for specific performance exhibited by the devisees of the purchaser, the Court, in decreeing the conveyance, ought to reserve to the vendor a lien on the land to secure the payment of the purchase money. *Ibid.* pl. 4. p. 342.
7. See *Sale*; and *Graham v. Call Executor of Means*, pl. 1. p. 396.
8. An agreement, to build a tavern in partnership, at the joint expense and risk, and for the joint benefit of the contracting parties, to be held by them in fee simple, decreed to be specifically performed at the instance of a partner who furnished the ground for the purpose, and had fully performed the contract on his part; notwithstanding many of

the partners were unwilling to carry it into effect, because, in their opinion, a change of circumstances had rendered the scheme unprofitable. *Birchett and others v. Bolling*, pl. 1. p. 442.

#### STAMPS.

1. Under the Act of 1812, ch. 2. § 18, 19, 20, a note negotiable at Bank may be given in evidence, if duly stamped before it becomes payable, though not so stamped when it was executed. *Hannon and High v. Battle*, pl. 1. p. 490.

#### STOCK.

1. Monies, directed to be invested, by executors, in government securities, should be accounted for, as if invested, after a reasonable time for that purpose; but the executor ought not to be charged with interest during such reasonable time; nor with interest upon dividends of stock, if such dividends have not actually been received. *Carter's Executors v. Cutting and Wife*, pl. 7. p. 223.
2. Where an executor is directed to invest money in stock, he ought to have the investment made in his own name as executor, in order that, if necessary, the stock may be readily converted into money to pay the debts of his Testator. *Ibid.* pl. 8.
3. What articles are not comprehended in a bequest of stock, plantation utensils, and household furniture. *Kendall's Ex'r., &c. v. Kendall, &c.*, pl. 2. p. 272.
4. Fattening hogs are not comprehended in a bequest, to one of a Testator's children, of the stock belonging to the place whereon he lived. *Ibid.* pl. 3.

#### SUBMISSION TO ARBITRATION.

1. A submission to arbitration, held a waiver of objections to previous proceedings in the cause. *Ligon v. Ford*, pl. 1. p. 10.

#### SUBSTITUTE.

1. See *Reference*; and *Manlove v. Thrift*, pl. 1. p. 493.

#### SUPERIOR COURTS OF CHANCERY.

1. See *Process*; and *Hughes v. Hall*, pl. 1. p. 431.

#### SUPERSEDEAS.

1. A Bond for prosecuting a Writ of *supersedeas* being executed by a surety only, without any principal obligor, is insufficient; and a *supersedeas* issued thereupon, ought to be

quashed. *Miller v. Blannerhasset*, pl. 1. p. 197.

### SURETIES.

1. A surety in a bond, having paid to the creditor the amount of a judgment against him thereupon, may file a bill in *equity*, (without having made a motion or brought any action at law) against the administrator and heirs of the principal obligor; for the purpose of *establishing his demand*; of having an account of the personal and real estates, and of being permitted to stand in the place of the obligee in the bond, so as to be paid out of the real estate, in default of the personal *Tinsley v. Oliver's Administrator and heirs*, pl. 1. p. 419.

### SURPLUS.

1. Whenever it does not clearly appear that Land was sold by the tract and not by the acre, the vendee ought to be responsible for the value of the surplus land found in the tract; and, if no circumstances appear to give a different rule such value is to be estimated by the average value, per acre, of the whole purchase. *Hundley v. Lyons*, pl. 1. p. 342.
2. See *Security*; and *Williams v. Price*, pl. 5. and 6. p. 507.

### SURVEY.

1. A patent is not void on the ground that the survey was made first, and the warrant obtained afterwards; though such irregularity appear on its face. *McClean v. Tomlinson*, pl. 1. p. 220.

### T

### TRESPASS.

1. An employer or master is, in general, not responsible for a wilful and unauthorized trespass committed by his agent, overseer, or servant. *Harris v. Nicholas*, pl. 4. p. 483.

### TIME, (LENGTH OF.)

1. A partition, which has been long acquiesced in, and acted upon by the parties generally, ought not to be disturbed at all, on the ground of *irregularity* only; though, if unjust or illegal, it may be impeached by a party who never acquiesced. *Carter's Executor v. Carter and others*, pl. 1. p. 108.
2. A Court of Equity ought not to direct an account to be taken, after a great lapse of time, and after acts of acquiescence, by the party demanding it, in a construction of his

rights, which, if correct, would render such account unnecessary. *Bolling v. Bolling and others*, pl. 3. p. 334.

### TITLE.

1. See *Possession*; and *Bream v. Capper's heirs*, pl. 1. p. 7.
2. If it appear from the record in ejectment, that the defendant, or his Testator, had adverse possession of the land, at a time when a Deed of Trust, under which the plaintiff claims, was executed, judgment ought to be rendered for the defendant, although the nature of his title does not appear. *Ibid.* pl. 2. See *Purchaser*; and *Sims's Administrator v. Lewis's Executor and others*, pl. 1. p. 29.
3. Five years peaceable and uninterrupted possession of slaves, under a loan not evidenced by deed duly recorded, vests a title in the loanee, which enures in favour of his creditors; and cannot be devested, as to them, by his returning the same to the lender after the said five years have expired. *Garth's Ex'ors. v. Barksdale*, pl. 1. p. 101.
4. See *Sale*; and *Hudson and others v. Hudson's Administrator*, pl. 2. p. 186.
5. A purchaser, having taken possession of the estate, is not entitled to relief in equity, against a Judgment for the purchase money, on the ground that the title of the vendor is not clearly shown to be good; but is bound, on his part, to prove it bad. *Granland v. Wight Ex'or. &c.* pl. 1. p. 285.
6. An executor selling the land of his Testator by virtue of a power given him by the Will, is not bound to convey with general warranty without an agreement to that effect; but only with special warranty, against himself and all persons claiming under him; notwithstanding a written agreement, after the sale, that he would make a good and indefeasible title to the purchaser; for such agreement is to be understood in reference to the terms of the sale. *Ibid.* pl. 2.
7. Under what circumstances, in a suit in equity for specific performance of an agreement for an exchange of lands, the Court may decree according to the prayer of the bill, without a reference to a commissioner of the plaintiff's title, though objected to by the defendant in his answer. *Stovall v. London*, pl. 1. p. 299.
8. The most important circumstances in this case appear to have been that the title by which the lands of each party were held, was set forth in the written agreement; and that the defendant, after filing his answer, received a sum of money agreed to be paid for the difference in value between the tracts to be exchanged. *Ibid.* pl. 2.
9. See *Slaves*; and *Baird v. Bland and others*, pl. 1. p. 492.

## TRUST.

1. Where a deed is made to the purchaser of land in fee simple, and on the same day, he, without being joined by his wife, executes a Deed of Trust to secure the payment of the purchase money, to raise which, the land is afterwards sold; *Quære*, whether, if she survive him, she be entitled to any right of dower in such land? *Moore v. Gilliam*, pl. 2 p. 348.
2. If the assignee of a mortgage, having obtained a decree of foreclosure and sale, become himself the highest bidder; but in consideration of a sum of money in hand, and a promise of the assignor to pay, in a short time, the balance of the debt for which the assignment was made, he agree to hold the property as security for said debt, but in trust for the assignor; a Court of Equity will compel him to give up and re-convey the property, upon the assignor's paying him the balance due on the bond, with the costs of the foreclosure and sale; deducting therefrom not only the actual profits he received while he held the property, but such profits as, but for his wilful default, he might have received, and also the amount of any waste or dilapidations, committed by him, or suffered by his neglect. *Southgate v. Taylor*, pl. 1. p. 420.
3. See *Sale*; and *Travis v. Claiborne*, pl. 1. p. 433.
4. See *Marriage Settlement*; and *Pickett and Wife v. Chilton*, pl. 1. p. 467.
4. A purchaser of land, suing for breach of a contract to make a good title, may with propriety come into a Court of Equity for pecuniary compensation, instead of proceeding at law in the first instance, if the vendor has conveyed away his property in trust, whereby there might be a difficulty in obtaining satisfaction of his judgment when recovered; the vendor, or his lawful representative, together with the trustees and cestuys que trusts being made defendants to the Bill. *Sims's Administrator v. Lewis's Executor and others*, pl. 1. p. 29.
5. A Deed of Trust, (if not revocable by the grantor,) is not to be considered a Will in disguise, on the grounds that nearly all his personal estate is thereby conveyed, and that he reserves to himself the possession and control of the property during his life. *Lightfoot's Ex'rs. and others v. Colgin and Wife*, pl. 2. p. 42.
6. A purchaser of land, encumbered by a Deed of Trust (duly recorded) for securing a debt, having bought of the debtor with consent of the trustee, and paid the purchase money, by discharging the debt secured by the deed, and by paying other sums of money; having also a deed of bargain and sale from the debtor, (though not recorded within the time prescribed by law,) and being put in possession of the land; he was adjudged to have the preferable right to call for the legal estate outstanding in the trustee, and to be protected against the claim of a creditor suing in equity upon an agreement, on the part of the debtor (bearing date before the purchase, but subsequent to the Deed of Trust) to secure him by a Deed of Trust on the same land; of which agreement the purchaser had no notice when he made the contract and paid his money. *Williamson v. Gordon's Ex'rs*, pl. 1. p. 257.

## TRUST (DEED OF.)

1. A man, indebted by bond, executed a conveyance of all his property, in trust for payment of his just debts, in the first place; for his own support during life in the second; and, afterwards, for the benefit of his wife, &c. He died, without any Will, or property acquired after the date of such conveyance; and no person administered on his estate. It was held, that an assignee of the bond was not restricted to his remedy at law against the assignor; but, without bringing any action at law might obtain relief in equity, by a decree for a sale of the property in the hands of the Trustees. *Taylor v. Picklin and others*, pl. 1. p. 25.
2. In such case, if the fund in the possession of the trustee prove insufficient, the plaintiff in equity may recover the balance of his claim from a debtor of the obligor; and, in default of both the funds, in whole or in part, he may proceed against the assignor. *Ibid.* pl. 2 p. 25.
3. And it seems, that, all the persons concerned being made parties, the Court may do complete justice in one suit, and make a full end of the whole controversy. *Ibid.* pl. 3. p. 25.

## TRUSTEES.

1. The Trustees of a College, being incorporated, may sue by their corporate title, without setting out their individual names. *Legrand v. Hampden Sidney College*, pl. 2. p. 324.

## U

## UNCERTAINTY.

1. A decree ought not to be reversed for uncertainty, in matters, as to which it is only interlocutory, and may be perfected by application to the Court. *Birchett and others v. Boling*, pl. 3. p. 442.

## UNITED STATES (COURTS OF)

1. The 12th section of the Act of Congress, passed September 24th, 1789, entitled, "an

Act to establish the Judicial Courts of the United States," does not extend to cases in which citizens are joint defendants with aliens, or with citizens of other States, and have also essential interests in the cause which may be effected by a removal into the Federal Court. *Williams v. Price*, pl. 1. p. 507.

2. *Quare*, whether that section extends to any case in which citizens are joint defendants with aliens, or with citizens of other States? *Ibid.* pl. 2.
3. *Quare*, whether the provisions of that section be authorized by the Constitution of the United States? *Ibid.* pl. 3.

### USAGE.

1. The general usage and understanding of the people of this country in relation to the subject, is an important circumstance to be considered in the construction of a contract. *Harris v. Nicholas*, pl. 3. p. 483.

### USURY.

1. That slaves were sold on a credit for more than a sum which the seller had previously offered to take for them in cash, with interest thereon during the time of credit, and that the seller was accustomed to lend money on usurious interest, is not sufficient evidence that such sale was intended as a cover for usury; there being no proof that a loan of money was intended by the parties. *West v. Belcher*, pl. 1. p. 187.

### V

### VARIANCE.

1. See *Repleader*; and *Beatty v. Smith & others*, pl. 1. p. 39.

### VENDOR AND VENDEE.

1. In case of a sale of personal property not executed by delivery, but to be consummated by delivery at another place; although, in consequence of earnest paid, or otherwise, the property be so vested in the buyer, that on complying or offering to comply with the contract on his part, he may recover the same from the seller or his agent; yet, until delivery, and while the goods are, (in legal phrase) *in transitu*, the seller may, on the buyer's becoming bankrupt, or being likely to be so, arrest the goods, or order his agent to arrest them; which order, operating as an indemnity to the agent, in addition to that arising from his possession of the goods, will be his guarantee for refusing to deliver them; and, perhaps, under circumstances, the agent would also have a right to demand other security from his principal, which it would be incumbent on him forthwith to give, under pain of a right in the agent to go on, and

execute the contract by a delivery. *Howatt & Co. v. Davis & Chalmers*, pl. 1. p. 34.

2. A vendor of land, by executing a conveyance and taking bond and security for the purchase money, discharges the land from his equitable lien, even while it continues the property of the purchaser. *Wilson & others v. Graham's Ex'ors.*, &c., pl. 1. p. 287.
3. Whenever it does not clearly appear that land was sold by the tract and not by the acre, the vendee ought to be responsible for the value of the surplus land found in the tract; and, if no circumstances appear to give a different rule, such value is to be estimated by the average value, per acre, of the whole purchase. *Hundley v. Lyons*, pl. 1. p. 342.
4. In a contract for sale of land, if no day be specified for delivering the deed and possession of the land, but the money be payable after delivery of the deed; it must be understood that the deed is to be delivered and possession given without delay. If therefore, (in consequence of a misunderstanding between the parties in relation to the terms of the sale) this be not done, the vendor is bound to account for and pay the profits of the land received by him after the contract; and the vendee to pay interest on the money, from the time when it would have been payable if the deed had been immediately delivered. *Ibid.* pl. 2.
5. In such case, in a decree for specific performance, liberty should be reserved to the vendee to use the name of the vendor to recover rents, in arrear, from lessees of the land, which became due between the date of the contract and delivery of the deed. *Ibid.* pl. 3.
6. In a suit against the Vendee of a slave, if he refer the controversy to arbitration without being authorized to do so by the Vendor, (who had bought and sold the slave *bona fide*), and when he might have cast the plaintiff in the ordinary course of law; he has no remedy in Equity against such Vendor, in the event of his losing the slave by an award. *Dust v. Conrad and others*, pl. 1. p. 411.
7. See *Warranty*, and *Crenshaw v. Smith & Co.* pl. 1. p. 415.

### VENUE.

1. In an action of assumpsit, in the Superior Court of a County, the declaration's laying the Venue in a different County, and omitting to state that the cause of action arose within the jurisdiction of the Court, is not error sufficient in arrest of Judgment. *Buster v. Ruffner*, pl. 1. p. 27.

### VERDICT.

1. Though interest ought not to be given, as of course, in actions for the recovery of rent in

- arrear, it may nevertheless be given under circumstances, to be judged of by the Jury; and, in case of a general verdict allowing interest, it shall be intended that sufficient circumstances existed to justify the allowance thereof. *Dow v. Adams's adm'rs.* pl. 1. p. 21.
2. But if the Jury state the circumstances in a special verdict, the Court should disallow the interest, if, under those circumstances it ought not to be allowed. *Ibid.* pl. 2. p. 21.
3. A general Verdict in *assumpsit* assessing entire damages on several Counts, (none of which are defective,) is not erroneous. *Buster v. Ruffner*, pl. 2. p. 27.
- See *Penally*; and *Tennant's Ex'or. v. Gray*, pl. 1. p. 494.

## W

## WAIVER.

1. A submission to arbitration, held a waiver of objections to previous proceedings in the cause. *Ligon v. Ford*, pl. 1. p. 10.
2. See *Sale*; and *Honatt & Co. v. Davis and Chalmers*, pl. 3. p. 31.
3. A Bond to stay Execution on a Judgment was assigned, for value received, without notice to the assignee of any Equity against it, and after dissolution of an Injunction to the Judgment. The security in said Bond, who was also Attorney in fact for the principal obligor, paid it off, without Execution and without any particular instruction to do so: after which, the Chancellor reinstated the Injunction. It was held that such payment by the Attorney in fact was a waiver of the Equity in behalf of the principal, who, therefore, notwithstanding the reinstatement of the Injunction, was not entitled to recover back the money paid. *Medley v. Jones*, pl. 1. p. 98.

## WARRANT.

1. A patent is not void, on the ground that the survey was made first and the warrant obtained afterwards, though such irregularity appear on its face. *McClean v. Tomlinson*, pl. 1. p. 220.

## WARRANTY.

1. See *Sheriffs*; and *Stone v. Pointer*, pl. 2. p. 287.
2. An Executor, selling the land of his Testator by virtue of a power given by the Will, is not bound to convey with general warranty without an agreement to that effect; but only with special warranty, against himself and all persons claiming under him; notwithstanding a written agreement, after the sale, that he would make a good and indefeasible

title to the purchaser; for such agreement is to be understood in reference to the terms of the sale. *Granland v. Wight Ex'or.* &c. pl. 2. p. 295.

3. It will, also, at the same time, (to make an end of the controversy,) give him relief against the Mortgagee who sold the slave with warranty of the title. *Dust v. Conrad and others*, pl. 4. p. 411.
4. It seems, that, where the purchase money for land which the vendor has conveyed with warranty, has not been fully paid; and the purchaser comes into equity for an abatement or discount, from the sum remaining due, on account of a loss by an eviction of part of the land; he should be allowed the value of the land lost, at the time of the purchase, and not at the time of the eviction. *Crenshaw v. Smith & Co.* pl. 1. p. 415.

## WASTE.

1. See *Trust*; and *Southgate v. Taylor*, pl. 1. p. 420.
2. See *Purchase Money*; and *Williams v. Price*, pl. 10. p. 507.
3. Where a purchaser, having his election to restore certain articles of personal property, makes an offer to do so, which the vendor refuses to accept, the purchaser is not thereafter responsible for any waste or damage the property may sustain, without his wilful misconduct. *Ibid.* pl. 11.

## WIDOW.

1. An Administrator with the Will annexed having, with the consent of the Widow, (who was tenant for life,) made certain additions, the utility and propriety of which were doubtful, and also sundry repairs to a barn on the land; it was decided that the expense of those additions should be allowed him against the widow only, and of the reasonable repairs against the widow and children generally. *Hudson and others v. Hudson's adm'r.* pl. 1. p. 180.
2. A Testator after devising certain lands and other property, to his wife, during her life, directed, "that she should be furnished during her life, out of his whole estate with whatever provisions and necessities of every kind she might have occasion for, to support herself and family in the same manner he had always lived, or in any other manner she might think proper." *Quare*, whether, under this devise, she had not a life interest in certain lands, devised to one of his sons, in general terms, without specifying when that son was to be put into possession? and a right to convert the whole profits thereof to the support of herself and the children generally during her life? *Bolting v. Bolting and others*, pl. 1. p. 334.

3. A plaintiff in Ejectment may recover against a Widow holding possession of the land, (of which her husband died seized) and having a right of dower, if it do not appear that the land in controversy was assigned her as her dower, or as part thereof, or was attached to the Mansion house of her husband at the time of his death. *Mogre v. Gilliom*, pl. 1. p. 346.
4. Where a Deed is made to the purchaser of land in fee simple, and, on the same day, he, without being joined by his wife, executed a Deed of trust to secure the payment of the purchase money, to raise which, the land is afterwards sold; *Quære*, whether, if she survived him, she be entitled to any right of dower in such land. *Ibid*. pl. 2.
5. A Testator's directing all his just debts to be paid, out of the sales of certain lands, does not authorise the payment of a *contingent* debt of his, out of the proceeds of such sales. *Ibid* pl. 6.
6. A Testator gave to his son *W.* a trust of land "during his natural life, and then to his heirs lawfully begotten of his body, that is, born at the time of his death, or nine Calendar months thereafter;" and "for want of such heirs, then, to his son *I.*'s two sons *Jacob* and *George*; one of them to sit a share on the whole of it, and give or receive one half of that sum from the other." This was a good limitation by way of contingent remainder, to *Jacob* and *George*. *Warner v. Mason, and Wife*, pl. 1. p. 242.
7. The addition of a codicil to a Will is not sufficient to operate as a devise of lands purchased by the Testator between the date of the Will and the date of the codicil; there being no words in the codicil indicating such to be the intention of the Testator. *Kendall's Ex'or. &c. v. Kendall, &c.* pl. 1. p. 272.
8. What articles are not comprehended in a bequest of stock, plantation utensils, and household furniture. *Ibid* p. 2.
9. Fattening hogs are not comprehended in a bequest, to one of the Testator's children, of the stock belonging to the place whereon he lived. *Ibid* pl. 3.
10. See *Sale*; and *Grantland v. Night Executor, &c.*, pl. 2. p. 295.
11. See *Widow*; and *Bolling v. Bolling, and others*, pl. 1. p. 334.
12. A devisee is in general bound to take notice of the contents of the will under which he received, when of full age, certain lands and other property from the executors; such will having then been proved and recorded. *Ibid*. pl. 2.
13. To effect the manifest intention of a Testator, the word "children" may be taken as synonymous with issue. In this case, therefore, a devise of slaves to a married woman, "to her and her children forever," was construed as a devise to her and her issue; the Court being of opinion that the word "children" was not intended to denote the devisee, or devisees, who were to take, nor to reduce the portion of the interest of the mother and to the slaves before given to her by the same clause, but to declare the duration of her interest therein. *Merrymans v. Merrymans and others*, pl. 1. p. 440.
14. *W. A.* by his last will, devised that, "in case he should die before his brother *R. A.*, all his estate both real and personal should descend, to him and his heirs forever; but in case his said brother should die without a lawful heir, it should then be equally divided between his brother *W. A.* and his two sons *S. A.* to them and their heirs forever." *W. A.* having died in the life time of the decedent,

# WILLS.

1. A Deed of Trust, if not revocable by the grantor, is not to be considered a will in disguise, on the grounds that nearly all his personal estate is thereby conveyed, and that he reserves to himself the possession and control of the property during his life. *Lightfoot's Executors v. Colgin and Wife*, pl. 2. p. 42.
2. A Testator devised his real estate in Virginia to his executors, to be sold by them, or the survivor of them, at such time, and in such manner, as they or the survivor of them should judge most advantageous; and gave and bequeathed the money arising from such sales, and the rents and profits of the said lands which might accrue before the sales, to his sisters, who were aliens, subject nevertheless to the payment of his just debts, and of certain legacies to his executors. *Quære*, whether, under this will, the title of the alien sisters was good, against the Commonwealth claiming the money for which the lands were sold; the Testator having died without any lawful heir, and his personal estate being sufficient to pay his debts. *The Commonwealth v. Martin's Executors and Devisees*, pl. 1. p. 117.
3. A Testator bequeathed to his brothers *David* and *James*, (who were aliens,) to be equally divided between them, the money arising from the sale of his land and other property; and from the debts due to him at the time of his death; and, as they resided in Great Britain, it was his will, that his executors make remittances to them, in bills of exchange, or in any other mode, as soon as they could." This was adjudged to be a good devise, so that a sale and conveyance by the executors was effectual to the purchaser; and that the land did not escheat to the Commonwealth in consequence of the Testator's dying without heirs. *The Commonwealth v. Selden and Seddon*, pl. 1. p. 160.
4. See *Payment*; and *Carter's Executor v. Cutting and Wife*, pl. 3. p. 108.
5. See *Gaming Debts*; and *Ibid*. pl. 5.

- and without issue, the limitation over could not take effect; but the estate descend to the heirs general of the devisor. *Allen v. Parker and others*, pl. 1. p. 457.
18. In such case, if the devisee had survived the devisor, he would have taken an estate tail, which, by the Act of Assembly, would have been turned into a fee simple; and the limitation over could not have taken effect. *Ibid.* pl. 2.
19. A Testator directed that, after his debts were paid, all his slaves, &c. be furnished for three years from his estate, to raise certain pecuniary legacies, by working his plantation called Farmer's Hall, which he then specifically devised: in such case, those legacies were no farther chargeable on the slaves, &c. than on such part thereof as should remain after the payment of debts and expenses of administration, and of a general charge on the estate by another clause in the Will; and therefore must abate so far as the same were not raised, within the three years, by the use of the said residue of slaves, &c. on the Farmer's Hall plantation: with liberty to sever, and apply to that use, any crops on the ground at the expiration of the said term of three years. *Matthews Ex'or. of Garnett v. Noel, and others*, pl. 1. p. 460.
20. What accounts ought to be taken in such case before a decree, for payment of those legacies, ought to be pronounced. *Ibid.* pl. 2.
21. In suit for freedom, the validity of a will, under which the plaintiff claims, ought not to be questioned; the same, (or a copy thereof, the original being destroyed,) having been

admitted to record, as and for the last Will of the Testator, by the proper Court, whose judgment remains unappealed from, and the validity of such will not contested by bill in Equity. *Lemon v. Reynolds Administrator of Holmes*, pl. 1. p. 552.

## WITNESSES.

1. See *Evidence*; and *Lawrence v. Swann and others*, pl. 2. p. 332.

## WRITS.

1. See *Scire Facias*; and *Lee and Fitzhugh v. Chilton*, pl. 1. and 2. p. 407.
2. See *Penalty*; and *Tennant's Executor v. Gray*, pl. 1. p. 494.
3. If, by direction of the plaintiff, the Writ be served on one only of two partners in trade, when the Declaration shews that the plaintiff knew the names of both, and he got a Verdict, upon the plea of *non assumpsit*, pleaded by the partner, on whom the Writ was served; Judgment ought to be arrested. *Shields v. Oney*, pl. 1. p. 550.

## WRIT OF ERROR.

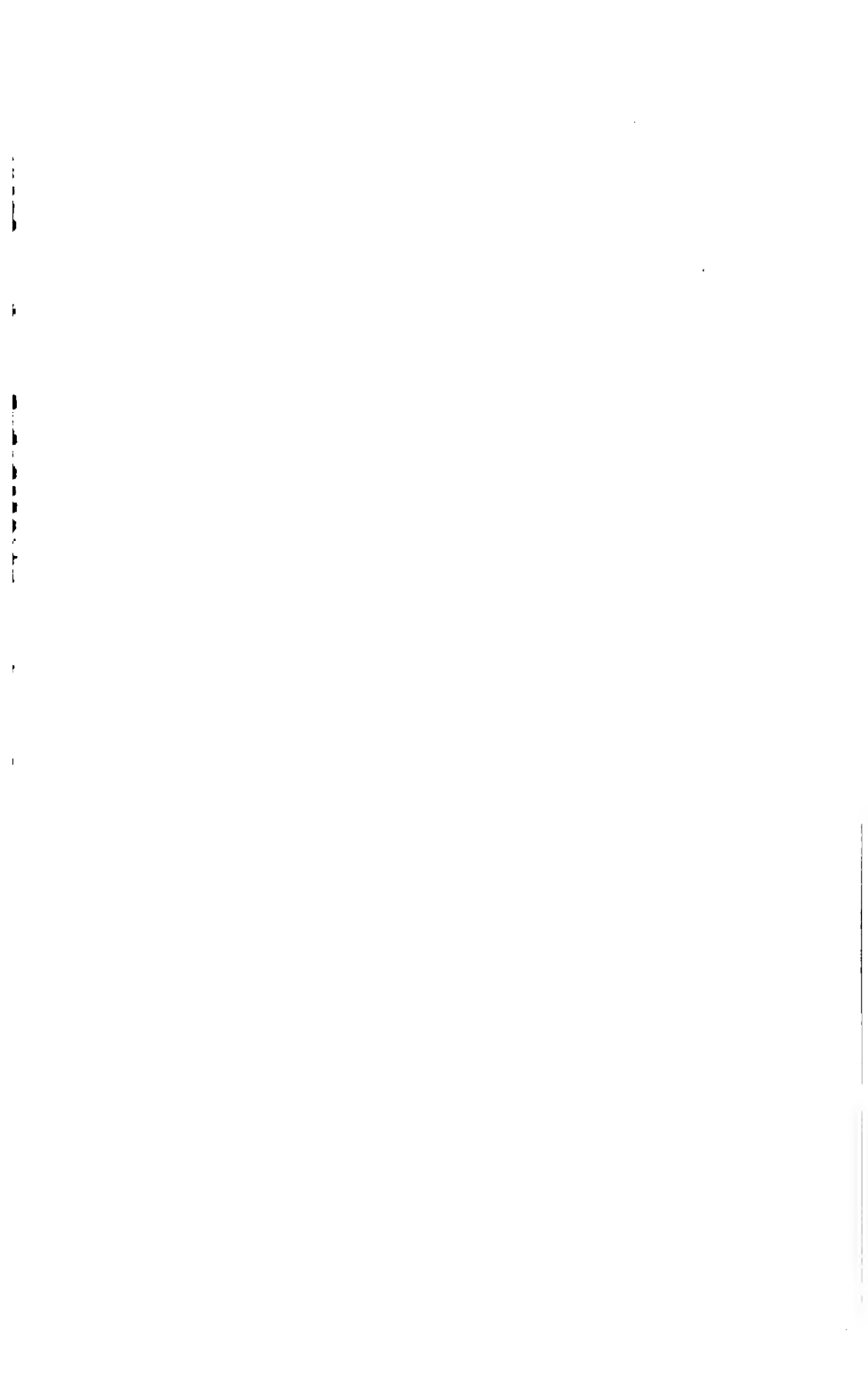
1. See *Militia*; and *Attorney General v. Foxton and Shepherd*, pl. 1. p. 232.

## WRIT, (OF RIGHT.)

1. See *Pleading*; and *Chichester v. Boggan*, pl. 1. p. 98.

## ERRATA.

- Page 55, line 6, for "*Fairfield v. Bowers*, 1 Vern. 202," read "*Fairebeard v. Bowers*, 2 Vern. 282."
- Page 67, line 32, for "*Bowen*" read "*Bowers*."







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